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IN THE

Supreme Court of the United States

October Term, 1982

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

ROBERT D. WILLETTE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

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Questions Presented

1. Does the interpretation of the New York State Constitution by the New York Court of Appeals in the area of right to counsel where a criminal suspect has a lawyer on a pending unrelated charge offend the Supremacy Clause of the United States Constitution?

2. Does the refusal of the New York courts to permit criminal suspects to exercise their right to self-representation guaranteed by the United States Constitution offend the Supremacy Clause of the federal constitution?

3. Do the holdings of the New York Court of Appeals in the area of right to counsel where a suspect in a criminal case has a lawyer on a pending unrelated charge offend the Ninth and Fourteenth Amendments of the United States Constitution?

TABLE OF CONTENTS

	PAGE
Questions Presented	1
Preliminary Statement	2
The Opinions Below	2
Jurisdiction	2
Constitutional Provisions Involved	3
Statement of the Case	4
The Decisions of the State Courts	6
Reasons for Granting the Writ	7
Question Number One—	
Does the interpretation of the New York State Constitution by the New York Court of Appeals in the area of right to counsel where a criminal suspect has a lawyer on a pending unrelated charge offend the Supremacy Clause of the United States Constitution?	7
Question Number Two—	
Does the refusal of the New York courts to permit criminal suspects to exercise their right to self-representation guaranteed by the United States Constitution offend the Supremacy Clause of the federal constitution?	13

PAGE

Question Number Three—

Do the holdings of the New York Court of Appeals in the area of right to counsel where a suspect in a criminal case has a lawyer on a pending unrelated charge offend the Ninth and Fourteenth Amendments of the United States Constitution? 20

Conclusion 23

Appendices

Appendix A—*Nisi Prius* Opinion 1a

Appendix B—Appellate Division Opinion and Order 31a

Appendix C—Certificate Denying Leave 35a

TABLE OF AUTHORITIES

PAGE

Cases:

Adams v. United States *ex rel. McCann*, 317 U.S. 269 (1942) 13

Bennett v. State of Maryland, 283 Md. 619 (1978) 10

Carter v. Illinois, 329 U.S. 173 (1946) 15
Charles v. Brown, 495 F.Supp. 862 (N.D.Ala. 1980) 20
Chapman v. Crane, 123 U.S. 540 (1887) 14
Clark v. Turner, 283 F.Supp. 909 (D.Utah 1968) 8
Cobbs v. Robinson, 528 F.2d 1331 (2d Cir. 1975), *cert. denied* 424 U.S. 947 (1976) 10
Commonwealth v. Thorne, 234 Pa.Super. 92 (1975) 11
Commonwealth v. Davis, 479 Pa. 274 (1978) 15
Cooper v. Aaron, 358 U.S. 1 (1958) 14

Diamond v. Bland, 11 Cal.3d 331 (1974), *cert. denied* 419 U.S. 885 (1974) 8
Dunaway v. New York, 422 U.S. 200 (1979) 18
Dutil v. State of Washington, 92 Wash.2d 84 (1980) 10

Faretta v. California, 422 U.S. 806 (1975) 13, 14, 18

Griswold v. Connecticut, 381 U.S. 479 (1965) 20

Henry v. Rock Hill, 376 U.S. 776 (1964) 14

Kennedy v. Fairman, 618 F.2d 1242 (7th Cir.), *cert. denied* 449 U.S. 939 (1980) 10
Kruidenier v. McCulloch, 258 Ia. 1121 (1966), *cert. denied* 385 U.S. 851 (1967) 8

Manousos v. Sarkis, —— Mass. ——, 416 N.E.2d 179 (1981) 9
Miller v. State of Tennessee, 584 S.W.2d 758 (Tenn. 1979) 9

PAGE

Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979) 10
North Carolina v. Butler, 441 U.S. 369 (1979) 14, 19

Opinion of the Justices, 370 A.2d 198 (Me. 1973) 8
Oregon v. Haas, 420 U.S. 714 (1975) 8, 14

People v. Bartolomeo, 53 N.Y.2d 225 (1981) 6, 11, 13, 23
People v. Booker, 69 Cal.App.3d 654 (2d Dist. 1977) 11
People v. Davis, 49 N.Y.2d 114 (1979) 11, 15
People *ex rel.* Scott v. Schwulst Building Center, Inc., 92 Ill.App.3d 552 (1981) 9–10
People v. Huntley, 15 N.Y.2d 72 (1965) 19
People v. Mack, 89 Cal.App.3d 974 (2d Dist. 1979) 11
People v. Morgan, 40 Ill.App.3d 711 (5th Dist. 1976) 11
People v. Ponder, 54 N.Y.2d 160 (1981) 12
People v. Rogers, 48 N.Y.2d 167 (1979) 6, 11, 13, 23
People v. Teresinski, 30 Cal.3d 822 (1982) 10
Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 12

Reynolds v. Sims, 377 U.S. 533, 584 (1964) 8
Roe v. Wade, 410 U.S. 113, 153 (1973) 22

State v. Davis, 582 S.W.2d 342 (Mo.App.1979) 11
State v. Gretzler, 12 Ariz. 60 (1980) 11
State of Hawaii v. Kaluna, 55 Haw. 361 (1974) 9
State of Hawaii v. Miyasaki, 62 Haw. 269 (1980) 9
State v. Richmond, 114 Ariz. 186 (1976) 11
State v. Sahlie, 277 N.W.2d 591 (S.Dak. 1979) 11
State of Tennessee *ex rel.* Peel v. Shelby County, 564 S.W.3d 371 (Tenn. 1976), *cert. denied* 434 U.S. 978 (1977) 8
Stone v. State of Florida, 378 So.2d 768 (Fla. 1979) 11

The Kroger Co. v. O'Hara Township, 481 Pa. 101 (1978) 10

PAGE

United States v. Brown, 569 F.2d 236 (5th Cir. 1978) 11
United States v. Cook, 311 F.Supp. 618 (W.D.Pa.1970) 20
United States v. Diamond, 492 F.Supp. 583 (D.Md. 1980) 11
United States v. Dority, 487 F.2d 846 (6th Cir. 1973).. 11
United States v. Grant, 549 F.2d 942 (4th Cir. 1977), *cert. denied* 432 U.S. 908 (1977) 10
United States v. Mohabir, 624 F.2d 1140 (2d Cir. 1980) 10, 18
United States v. VanDusen, 431 F.2d 1278 (1st Cir. 1970) 11
United States v. Woods, 613 F.2d 629 (6th Cir.), *cert. denied* 446 U.S. 920 (1980) 11

White v. Finkbeiner, 611 F.2d 186 (7th Cir. 1979) (*en banc*), *cert. denied* 451 U.S. 1031 (1981) 10

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The petitioner, the People of the State of New York, respectfully prays that a writ of certiorari issue to review the order and opinion of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, entered in this proceeding on March 22, 1982.

Preliminary Statement

Pursuant to a judgment of the Supreme Court of the State of New York, County of Suffolk, the respondent Robert Willette was convicted, following entry of a plea of guilty, of manslaughter in the first degree, and he was sentenced to an indeterminate term of incarceration of zero to twelve years.

The Opinions Below

At the conclusion of a suppression hearing conducted pursuant to a motion by the defendants, the *nisi prius* court, in an oral opinion read into the record, denied the motion to suppress in all respects. The opinion is not reported, and is annexed hereto as Appendix "A". The opinion of the Appellate Division, Second Judicial Department, which reversed the judgment of conviction and vacated the plea, is reported at 87 A.D.2d 642, 448 N.Y.S.2d 210 (2d Dep't 1982), and is annexed hereto as Appendix "B". The certificate of the Court of Appeals of the State of New York, per Hon. Sol Wachtler, Associate Judge, dated May 27, 1982, denying leave to appeal to that court, is annexed hereto as Appendix "C".

Jurisdiction

The petitioner seeks certiorari to review an order of the Supreme Court of the State of New York, Appellate Division, Second Department, dated March 22, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257(3). The certificate of the New York Court of Appeals denying leave is dated May 27, 1982.

Constitutional Provisions Involved

Article VI, Clause 2 of the United States Constitution:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."

The Sixth Amendment of the United States Constitution which provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

The Ninth Amendment of the United States Constitution:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the People."

The Fourteenth Amendment of the United States Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 6 of the New York State Constitution which provides, in pertinent part,

> "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions."

Statement of the Case

The respondent was indicted, together with co-defendants Ronald Kolb and Glen Wagner,[1] for murder in the second degree, robbery in the second degree, burglary in the first degree, and conspiracy in the second degree. According to the prosecution's theory of the case, on March 13, 1975, the defendants, pursuant to their agreement and plan, entered the home of Thomas Henderson in Blue Point, New York, stole various items of electronic and audio equipment from him and beat him to death with a baseball bat.

There was a fourth participant in the murder, Robert Gribbins.[2] The investigation turned up no leads for over three years. Then, in May 1978, Gribbins was arrested for a burglary (in which, incidentally, he also implicated the respondent). In return for some consideration for his own problems, Gribbins agreed to cooperate with the police in solving the Henderson murder. Accordingly, the police

1. Kolb and Wagner chose to go to trial. They were found guilty of murder in the second degree, burglary in the second degree, and conspiracy in the second degree. Each received three concurrent terms of imprisonment, the longest of which was twenty-five years to life. They are presently incarcerated, and, although each has filed a notice of appeal, neither one has perfected it.

2. There was, in fact, a fifth—Ronald Kolb's brother, Kevin Kolb. However, Kevin died before the crime was solved, and Gribbins was not indicted because of his cooperation with the police.

wired Gribbins with electronic recording equipment, and he engaged in a conversation with the respondent and Candy Norton, respondent's girlfriend, in which the police surveillance team overheard the respondent incriminate himself in the Henderson murder. On the basis of that conversation, the police arrested the respondent and brought him and Candy Norton to police headquarters. After first obtaining incriminating statements from Candy Norton, the police confronted the respondent with her statements, as well as respondent's own statements made to Gribbins. The respondent then admitted some limited participation in the murder, and he implicated Kolb and Wagner. He also agreed to cooperate with the police in the same fashion that Gribbins was doing. Accordingly, the respondent engaged in a recorded conversation with Wagner, and Gribbins did the same with Kolb, which formed the basis of the arrest of the two co-defendants, both of whom likewise confessed to the murder. This scenario was played out over the course of three days on September 12, 13 and 14, 1978.

All three defendants moved to suppress their statements, and a five-day joint hearing was held in June 1979. The respondent claimed that his statements were beaten out of him; that they were obtained in violation of his right to counsel; and that they were induced by an unconditional promise that he would not be incarcerated. The hearing court denied all defense motions. Interestingly, as it will be explained below, none of these issues was determinative in the state court appeal.

The following portions of the suppression hearing subsequently proved to be the crucial ones. The respondent gave an oral confession to the two police officers who were

questioning him, and, shortly thereafter, a written confession to an Assistant District Attorney who was called to speak with him. Both the police and the prosecutor knew that the respondent had a lawyer on a pending unrelated criminal charge. In fact, the hearing court so stated in its factual findings. However, under the law of New York at that time, the fact that a criminal suspect had a lawyer on a pending unrelated charge did not in any way implicate his right to counsel as to the subject crime for which he is being questioned. Thus, that fact was not reason for the hearing court to grant suppression.

The Decisions of the State Courts

The suppression hearing in the *nisi prius* court was was held in June 1979 and the judge rendered his decision on September 15, 1979. Subsequently, on October 23, 1979, the New York Court of Appeals rendered its decision in *People* v. *Rogers* (48 N.Y.2d 167), holding that when a criminal suspect is represented by an attorney on a pending unrelated charge, his right to counsel attaches under the New York Constitution, and he may not waive that right except in the presence of counsel. Thus, although the hearing court properly denied the suppression motions under the then existing law, by the time this case was argued in the Appellate Division, *People* v. *Rogers* was the law in New York, thus requiring reversal of the conviction,[3] solely on this issue. The federal constitutional questions raised in the instant petition were argued by the prosecution in

3. *Rogers* has been applied retroactively in New York. Moreover, in *People* v. *Bartolomeo* (53 N.Y.2d 225 [1981]), the New York Court of Appeals extended *Rogers* to situations where the interrogating officers do not even know of a suspect's representation on another charge, but they have reason to know.

the Appellate Division, but were not addressed in that court's opinion. The New York Court of Appeals declined to entertain further appeal.

Reasons for Granting the Writ

QUESTION NUMBER ONE

Does the interpretation of the New York State Constitution by the New York Court of Appeals in the area of right to counsel where a criminal suspect has a lawyer on a pending unrelated charge offend the Supremacy Clause of the United States Constitution?

Art. VI, Clause 2 of the United States Constitution reads as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."

The Sixth Amendment of the Constitution reads, in pertinent part, as follows:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

The relevant portion of Art. I, Sec. 6 of the New York Constitution reads as follows:

> "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions."

Thus, the federal constitution and the New York constitution are textually virtually identical with respect to right

to counsel. In fact, the state constitution purports to be even more restrictive, in providing specifically that the right attaches only "in any trial". While it is true that, as a general rule, a state may afford suspects in criminal cases broader rights under its state constitution than the United States Supreme Court has deemed necessary under the federal constitution (*Oregon* v. *Haas*, 420 U.S. 714 [1975]), where the relevant texts of the two constitutions are virtually identical, the state court should not be permitted to give that text an interpretation perversely contrary to the interpretation of the same text by the Supreme Court. To allow state courts to do so would make a mockery of the Supremacy Clause of the federal constitution. If a state seeks to create such a broader panoply of rights for suspected criminals, it should be done through an amendment to the state constitution, after proper hearings at which the citizens of the state can present their views to the legislators they elected.

It is, of course, beyond dispute that "when there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls" (*Reynolds* v. *Sims*, 377 U.S. 533, 584 [1964]). This has been the unopposed view in both the state courts (see, *e.g.*, *State of Tennessee ex rel. Peel* v. *Shelby County*, 564 S.W.3d 371 [Tenn. 1976], *cert. denied* 434 U.S. 978 [1977]; *Diamond* v. *Bland*, 11 Cal.3d 331 [1974], *cert. denied* 419 U.S. 885 [1974]; *Opinion of the Justices*, 370 A.2d 198 [Me. 1973]; and *Kruidenier* v. *McCulloch*, 258 Ia. 1121 [1966], *cert. denied* 386 U.S. 851 [1967]), as well as in the federal courts (see *Clark* v. *Turner*, 283 F.Supp. 909 [D.Utah 1968]).

Whether or not state courts have unlimited authority to ignore textual identity between the federal and a state con-

stitution and to interpret the state constitution radically at variance with the opinions of our highest Court is a question in search of an answer. For example, although the highest courts of two states have purported to so authorize themselves (*Miller* v. *State of Tennessee*, 584 S.W.2d 758 [Tenn. 1979] and *State of Hawaii* v. *Kaluna*, 55 Haw. 361 [1974]), other high court decisions in the same two states have held precisely the opposite. In *In the Matter of the Petition for Rule of Court Governing Lawyer Advertising* (564 S.W.2d 638 [Tenn. 1978]), the Tennessee Supreme Court stated explicitly:

> "It is fundamental to the law that where this Court's interpretation or application of a provision of our State Constitution conflicts with the Supreme Court's interpretation of an analogous provision of the Federal Constitution, the State Constitution must yield under the Supremacy Clause" (*Id.* at 642).

Similarly, in *State of Hawaii* v. *Miyasaka* (62 Haw. 269 [1980]), the Hawaii Supreme Court traced in fine detail the balancing of interpretations between state and federal constitutions where there are textually identical provisions. The state court, it was held, is bound in such cases to accord great deference to the holdings of the United States Supreme Court; thus, while the state court, in interpreting its own constitution, is not absolutely bound to follow the high Court's rulings to the last jot, the state court is certainly not free to disregard those rulings and to flaunt the supremacy of the high Court by developing interpretations that have no logical relationship whatsoever to what the Supreme Court has said. Other states have adopted this reasonably restrictive view (see, *e.g.*, *Manousos* v. *Sarkis*, —— Mass. ——, 416 N.E.2d 179 [1981]; *People ex rel. Scott*

v. *Schwulst Building Center, Inc.*, 92 Ill.App.3d 552 [1981];[4] *People* v. *Teresinski*, 30 Cal.3d 822 [1982]; *Dutil* v. *State of Washington*, 92 Wash.2d 84 [1980]; *The Kroger Co.* v. *O'Hara Township*, 481 Pa. 101 [1978]; and *Bennett* v. *State of Maryland*, 283 Md. 619 [1978]).

It bears emphasis that the New York Court of Appeals has accorded to suspected criminals a right to counsel far broader than those deemed necessary by the Supreme Court under the textually analogous provisions of the federal constitution. Under federal law, the event that triggers the attachment of indelibility with respect to right to counsel —that is, the point after which a suspect may not waive counsel in the absence of counsel—is the actual entry of an attorney into that case. Thus, in the federal system, a suspected criminal may waive his right to counsel in the absence of counsel even after indictment and even after he has actually requested an attorney (see, *e.g.*, *White* v. *Finkbeiner*, 611 F.2d 186 [7th Cir. 1979] [en banc], *cert. denied* 436 U.S. 919 [1978]; *United States* v. *Mohabir*, 624 F.2d 1140 [2d Cir. 1980]; *Nash* v. *Estelle*, 597 F.2d 513 [5th Cir. 1979]; *United States* v. *Grant*, 549 F.2d 942 [4th Cir. 1977], *cert. denied* 432 U.S. 908 [1977]; *Cobbs* v. *Robinson*, 528 F.2d 1331 [2d Cir. 1975], *cert. denied* 424 U.S. 947 [1976]; *Kennedy* v. *Fairman*, 618 F.2d 1248 [7th Cir. 1978], *cert. denied* 441 U.S. 947 [1979]).

Most assuredly, the federal courts have not seen fit to attach the right to counsel indelibly where the suspect does not have a lawyer, has not asked for a lawyer, has spe-

4. Although the Illinois Supreme Court reversed (89 Ill.2d 365 [1982], it approved the lower court's rationale, concluding, however, that the language of the two constitutions was not the same in meaning.

cifically stated that he does not want a lawyer, and has specifically declined to tell the police that he has a lawyer on another charge.[5] For example, in *United States* v. *Woods* (612 F.2d 629 [6th Cir.], *cert. denied* —— U.S. ——, 100 S.Ct. 1856 [1980]), federal authorities interviewed a prisoner who was in state custody and represented by counsel on pending state charges. Nonetheless, the suspect's waiver of right to counsel as to the federal charges was sustained. To the same effect was the decision in *United States* v. *Brown* (569 F.2d 236 [5th Cir. 1978]).

It has also been held in the federal courts that questioning a suspect and eliciting statements even though the suspect is represented by a lawyer on a pending unrelated charge does not necessarily make the statements inadmissible, even in the absence of a suspect's legal representation (*United States* v. *Dority*, 487 F.2d 846 [2d Cir. 1973]; and *United States* v. *VanDusen*, 431 F.2d 1278 [1st Cir. 1970]). Stated another way, uncounseled statements taken from a defendant while he is under indictment and represented by counsel can be used at any trial other than the trial of that indictment (*United States* v. *Diamond*, 492 F.Supp. 583 [D.Md. 1980]).

As indicated above, the petitioner does not dispute the right of a state to extend rights to suspected criminals

5. Moreover, the following representative sampling of sister state cases also teaches that the *Rogers/Bartolomeo* rationale has not been adopted in any other jurisdiction: (*State* v. *Gretzler*, 12 Ariz. 60 [1980]; *Stone* v. *State*, 378 So.2d 768 [Fla. 1979]; *State* v. *Sahlie*, 277 N.W.2d 591 [S.Dak. 1979]; *Jackson* v. *State*, 268 Ind. 360 [1978]; *State* v. *Richmond*, 114 Ariz. 186 [1976]; *People* v. *Mack*, 89 Cal.App.3d 974 [2d Dist. 1979]; *State* v. *Davis*, 582 S.W.2d 342 [Mo.App. 1979]; *People* v. *Booker*, 69 Cal.App.3d 654 [2d Dist. 1977]; *People* v. *Morgan*, 40 Ill.App.3d 711 [5th Dist. 1976]; and *Commonwealth* v. *Thorne*, 234 Pa.Super. 92 [1975]).

beyond those declared necessary under the federal constitution. However, that freedom on the part of a state court should be limited where the relevant provisions of the state and federal constitutions are textually identical. Such clear similarity in language indicates the legislative intent of the constitutional drafters that the two documents are to be interpreted in a similar fashion. In other words, where the draftsmen of the United States Constitution, which postdated the New York Constitution, have expressly spelled out that the law of the land on right to counsel as interpreted by the Supreme Court under the federal constitution, shall be at least conceptually in conformity with the law under the state constitutions from which the federal was borrowed, a state court that engrafts upon its state constitution an interpretation radically at variance with the Supreme Court's perception of the very same language violates the federal Supremacy Clause. If a state wishes to confer, under its constitution, rights substantially beyond those deemed necessary and appropriate by the draftsmen of the federal constitution, the proper way to do so should be an amendment to the state constitution. This view finds support not only in logic but in the language of the Supreme Court itself in its most recent pronouncement in this regard. In *Pruneyard Shopping Center* v. *Robins* (447 U.S. 74 [1980]), the Court reiterated "the authority of the State to exercise its police power or its sovereign right *to adopt in its own constitution* individual liberties more expansive than those conferred by the Federal Constitution" (Emphasis added) (*Id.* at 81). Interestingly, the best possible state authority for the position the petitioner urges here was provided quite recently by the New York Court of Appeals itself. In *People* v. *Ponder* (54 N.Y.2d 160 [1981]), in a Fourth Amendment context, New York abol-

ished the "automatic standing" rule under its state constitution, precisely because the United States Supreme Court had abolished the rule under the Federal Constitution. Wrote the court:

> "Article I, section 12 of the New York State Constitution conforms with the Fourth Amendment regarding the proscription against unreasonable searches and seizures, and this identity of language supports a policy of uniformity in both State and Federal courts." (*Id.* at 165).

QUESTION NUMBER TWO

Does the refusal of the New York courts to permit criminal suspects to exercise their right to self-representation guaranteed by the United States Constitution offend the Supremacy Clause of the federal constitution?

The Sixth Amendment of the United States Constitution guarantees an individual the right to proceed *pro se* at all critical stages of the prosecution (*Faretta* v. *California*, 422 U.S. 806 [1975]; *Carter* v. *Illinois*, 329 U.S. 173 [1946]; and *Adams* v. *United States ex rel. McCann*, 317 U.S. 269 [1942]). This federal right has been made binding on the states through the Fourteenth Amendment, and thus no state may force a lawyer upon an unwilling defendant (*Faretta* v. *California, supra*). *People* v. *Rogers* (48 N.Y. 2d 167 [1979]) and *People* v. *Bartolomeo* (53 N.Y.2d 225 [1981]), in interpreting Article I, Sec. 6 of the New York Constitution, New York's right to counsel provision, does just that with respect to custodial interrogation, a critical stage of the proceedings; in essence, once an individual has retained counsel for an unrelated purpose, he becomes

imprisoned in his constitutional privileges. As a result, the rule of *Rogers* and *Bartolomeo* conflicts with and undermines a federally protected constitutional right. Since the federal constitution is supreme, these decisions must be overruled pursuant to the Supremacy Clause of the federal constitution (*Cooper* v. *Aarson*, 358 U.S. 1 [1958]; and *Henry* v. *Rock Hill*, 376 U.S. 776 [1964].[6]

The Supreme Court in *Faretta* held that an accused enjoys the constitutional right to self-representation with respect to his own case: "Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his case . . . counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" (*Faretta* v. *California*, *supra*, at 834).

In this respect, other courts have recognized and applied logically the constitutional right to self-representation at

6. With respect to the question of standing, while the right to self-representation is personal, the petitioner here is not asserting respondent's constitutional rights. Rather, we are asserting our standing to attack the federal constitutional validity of New York's *per se* rule because pursuant to this rule, the petitioner is an adversely affected party litigant. It is well settled that the constitutionality of a ruling may be asserted only by a litigant who is adversely affected by that ruling. In this case, the right of the People, a party litigant, to introduce otherwise competent, reliable evidence of guilt may be denied as a result of New York's *per se* rule. Thus, the petitioner has standing to raise the question of the federal constitutionality of New York's *per se* rule (*Oregon* v. *Haas*, 420 U.S. 714 [1975]; and *Chapman* v. *Crane*, 123 U.S. 540 [1887]; *cf. Fare* v. *C.*, 442 U.S. 707 [1979]; and *North Carolina* v. *Butler*, 441 U.S. 369 [1979]).

custodial interrogation, respecting the inestimable worth of free choice as guaranteed by the Bill of Rights. Thus courts have eschewed New York's *per se* no questioning rule once an accused is in custody, even where he requests counsel, recognizing that he has a constitutional right to change his mind and proceed without counsel with respect to station house questioning. In *Commonwealth* v. *Davis* (479 Pa. 274 [1978]), the Supreme Court of that state wrote, albeit as dictum:

> "If a criminal defendant in a state trial has the right under the Federal Constitution to waive the assistance of counsel, this right may not be curtailed by the provisions of the Pennsylvania Constitution." (*Id.* at 275, fn. 3).

As stated in *Carter* v. *Illinois* (329 U.S. 173, 174-75 [1946]): "Neither the historic conception of due process nor the validity it derives from progressive standards of justice denies a person the right . . . to confess guilt. . . . The [federal] constitution does not require that under all circumstances, counsel be forced upon a defendant". In this regard, *Faretta* emphasizes that the constitutional right to self-representation is paramount, while the right to the assistance of counsel is supplemental, with regard to a criminal proceeding. Indeed, New York in *People* v. *Davis* (49 N.Y.2d 114 [1979]) recognized the paramount right to self-representation with respect to trial, citing *Faretta*. To this end, respectfully, we cannot conceive of a more critical stage of the proceeding than the trial itself. Why counsel in New York never requested and unequivocally waived must be thrust upon an unwilling individual defies reason and logic.

In *Bartolomeo,* the dissenting opinion of Judge Sol Wachtler emphatically pinpointed the illogic of paternalistically thrusting unwanted counsel on a suspect in custody:

> "A defendant who commits a crime while out on bail should not be immune from questioning by police with respect to his latest criminal acts. Such a rule would be a benefit to the repeat offender and an obstacle to law enforcement." (*Id.* at 236).
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> "[N]either of these principles requires the conclusion that a person who has once been arrested on a charge, however minor, upon which counsel has either entered the picture actually or constructively, must be insulated from uncounseled police interrogation. Such a conclusion, in addition to not being analytically required, serves to extend prior cases beyond their intended scope, create injustice, and benefit those who are frequently arrested.
>
> It has never been held, nor does basic fairness require, that all police interrogations will always, and in all circumstances, take place in the presence of counsel. *Implicit in this is a recognition that a defendant in most instances is capable of deciding for his own reasons whether he is in need of or desires such assistance. Also implicit is that there is no need for the paternalistic view that the police should assure the assertion of a defendant's right to counsel, despite his own expressed wishes to the contrary.*" (Emphasis added). (*Id.* at 237-38).
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>
> "Where the defendant has in no way, despite an expressed opportunity to do so, sought the advice of counsel in connection with a particular custodial event or on a particular charge . . . there is simply no indication of a defendant's inability to deal with the po-

lice, and if he chooses to do so there is no inherent evil in permitting the defendant to proceed in the absence of an attorney." (*Id.* at 238).

• • •

"But logic does not support the assumption that because a defendant has a right to counsel in the critical stages of one proceeding, an equally critical phase has been reached in all other unrelated investigations. For this reason, it is not material that the police in this case knew of a prior arrest of the defendant on which his right to counsel might have attached.

It also does not necessarily follow that the knowledge of the police of defendant's arrest is the equivalent of knowledge that he actually was represented by counsel. Beyond this, there certainly is no reason to assume on these facts that if there was counsel, that counsel would have become involved in a subsequent unrelated investigation, particularly in view of defendant's assertion that he wishes to proceed without the assistance of counsel.

Nevertheless, the majority contends that the police were bound to make affirmative inquiries into the possibility that defendant might in some manner have been represented by counsel. However, neither the Federal courts, nor this court on any previous occasion has ever suggested the constitutional necessity for what must be recognized as a new addition to the litany of Miranda warnings. It is already the law that a suspect must be clearly told he may refuse to say anything in the absence of his attorney. To say that the police must do more than this carries the right to counsel to unheard of extremes.

It is the common criminal, not the one-time offender, who nearly always will manage to have at least one serious charge pending, so that the attorney in the picture can provide him with virtual immunity from

> questioning in subsequent investigations. I had thought it clear that although our courts are sometimes required to let the guilty go free, this is not because the Constitution serves only the miscreant, but rather because our constitutional protections must apply evenly to us all. By its analysis I believe the majority has turned this basic principle completely around by providing what is in effect a dispensation for the persistent offender." (*Id.* at 238-39).

Indeed, in *United States* v. *Mohabir* (624 F.2d 1140 [2d Cir. 1980]), the Second Circuit observed presciently that the New York law may well be in conflict with the individual's constitutional right to self-representation:

> "We put off until another day consideration of the third alternative suggested above, that of simply outlawing all statements following uncounseled waivers by indicted defendants. Such a course would be the most drastic of the three, and might run counter to the policy that a defendant constitutionally can insist upon proceeding without counsel even though he has been fully advised of the folly of doing so. See *Faretta* v. *California, supra.*" (*Id.* at 1153).

While the state may afford the accused more federal constitutional protection than the Supreme Court devises, it cannot dilute federal protections and provide less (*Dunaway* v. *New York*, 422 U.S. 200 [1979]). Moreover, while the state can impose greater restrictions on the police, they cannot do so at the expense of guaranteed federal constitutional liberties. "By creating an inflexible rule that no . . . waiver can ever suffice, [New York] has gone beyond the requirements of federal organic law. It follows that its judgment cannot stand, since a state court can neither add to nor subtract from the mandates of the United States

Constitution." (*North Carolina* v. *Butler*, 441 U.S. 369, 376 [1979]).

As we have demonstrated, the New York courts have encroached and trampled upon the recognized federal constitutional right of self-representation and free choice with respect to station house questioning, which is personal to the accused, by subordinating that precious fundamental right to the supplemental right to counsel, where the accused has made an informed choice to dispense with counsel who is not present or in the case and speak with the police on his own. New York has accomplished this by preordaining the imposition of the exclusionary rule, thus deterring law enforcement from speaking with the accused once he has counsel on any unrelated charge.

Finally, overruling *Rogers* and *Bartolomeo* will not denigrate the right to counsel; left intact is the burden of the state to prove beyond a reasonable doubt that the waiver of fifth and sixth Amendment rights with regard to a statement was knowing, intelligent and voluntary (*People* v. *Huntley*, 15 N.Y.2d 72 [1965]). And like *Faretta*, those entrusted with making that determination are the courts, not the police or the prosecution.

QUESTION NUMBER THREE

Do the holdings of the New York Court of Appeals in the area of right to counsel where a suspect in a criminal case has a lawyer on a pending unrelated charge offend the Ninth and Fourteenth Amendments of the United States Constitution?

The Ninth Amendment of the United States Constitution provides: "The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the People." The purpose of this Amendment is to guarantee to the People those rights inherent to citizenship in a democracy which are not specifically enumerated in the Bill of Rights (*Griswold* v. *Connecticut*, 381 U.S. 479, 488-89, 490-91 [1965] [Goldberg, J., concurring]; *United States* v. *Cook*, 311 F.Supp. 618 [W.D. Pa. 1970]). Stated another way, the Ninth Amendment was added to the Bill of Rights to ensure that the maxim *expressio unius est exclusio alterius* would not be used at a later time to deny fundamental rights merely because they were not specifically enumerated in the Constitution (*Charles* v. *Brown*, 459 F.Supp. 862 [N.D.Ala. 1980]). It is respectfully submitted that this Amendment is broad enough in scope to encompass a right to personal safety on behalf of the People of the State of New York.

Justice Goldberg, with whom Justice Brennan and the then Chief Justice Warren joined, discussed the Ninth Amendment at length in his concurring opinion in *Griswold*. He first emphasized at 488-89:

> "The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed

that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments . . .

[The Amendment] was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected."

Continuing, Justice Goldberg explained at 490-91:

"While this Court has had little occasion to interpret the Ninth Amendment, '[i]t cannot be presumed that any clause in the constitution is intended to be without effect.' In interpreting the Constitution, 'real effect should be given to all the words it uses.' The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment . . ."

Justice Goldberg added at 493-94:

"In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the traditional and [collective] conscience of

> our people to determine whether a principle is so rooted [there] . . . as to be ranked as fundamental. The inquiry is whether a right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Liberty also gains content from the emanations of . . . specific [constitutional] guarantees and from experience with the requirements of a free society."

Relying in part upon this discussion of the importance of the Ninth Amendment by Justice Goldberg, a majority of the Court in *Roe* v. *Wade* (410 U.S. 113, 153 [1973]) stated: "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether to determine her pregnancy." This recognizes that people, and not only states, have rights under the Ninth Amendment.

As stated in 9 N.Y. Jur. *Constitutional Law*, Sec. 225: "It has been said that, of all rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security." This right, whether emanating directly from the Ninth Amendment or perhaps even pre-existing the United States Constitution and New York State Constitution, is certainly broad enough to cover the right of the public to be protected from criminals who freely and voluntarily admit to police the commission of a felony. Allowing criminals to go free after guilt has been established beyond a reasonable doubt en-

dangers the law abiding members of society and removes any possible deterrent that punishment for crimes may have. This not only endangers public safety and makes a mockery of justice, but it also absolutely frustrates police in their attempt to fulfill their investigatory duties.

The petitioner respectfully offers that because *People* v. *Rogers* and *People* v. *Bartolomeo* contravene the Ninth Amendment right of public safety for the citizens of New York State, they must be declared invalid under the federal constitution.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PATRICK HENRY
District Attorney, Suffolk County
Attorney for Petitioner

VINCENT A. MALITO
Chief, Appeals Bureau
Assistant District Attorney
Of Counsel

APPENDIX A

Nisi Prius Opinion

SUPREME COURT

SUFFOLK COUNTY

PART III

Indictment #2224-78

THE PEOPLE OF THE STATE OF NEW YORK

against

RONALD JAMES KOLB, GLEN EDWARD WAGNER
and ROBERT WILLETTE,

Defendants.

September 5, 1979
Riverhead, New York

Before:

HON. THOMAS M. STARK, Judge.

Appearances:

HON. PATRICK HENRY,
District Attorney, Suffolk County

By: THOMAS SPOTA, ESQ.,
Assistant District Attorney

WILLIAM O'LEARY, ESQ.,
Attorney for Defendant Kolb
548 Roanoke Avenue
Riverhead, New York

Appendix A

BENEDICT VUTURO, ESQ.,
Attorney for Defendant Wagner
71 Smithtown Boulevard
Smithtown, New York

EDWARD THOMPSON, ESQ.,
Attorney for Defendant Willette
350 Vanderbilt Motor Parkway
Hauppauge, New York

Vincent J. Restivo,
Official Court Reporter.

Appendix A

The Clerk: People versus Ronald Kolb, Glen Wagner and Robert Willette.

Mr. O'Leary: William R. O'Leary, for the defendant, Ronald Kolb.

Mr. Vuturo: Benedict Vuturo, 71 Smithtown Boulevard, Smithtown, New York, for the Defendant Wagner.

Mr. Thompson: Edward Thompson, 350 Vanderbilt Motor Parkway, Hauppauge, New York, for the defendant, Robert Willette.

The Court: I believe the Clerk explained to you the reason for the delay this morning? The Sheriff has as yet been unable to deliver prisoners to this particular part.

One of the defendants is in custody.

I did not convene this proceeding until I was just given an indication that Mr. Kolb's attorney would be willing to waive his attendance at the proceedings this morning.

Mr. O'Leary,

Mr. O'Leary: That is so.

The Court: Are you fully willing to waive the personal attendance of your client at the proceedings this morning?

Mr. O'Leary: I will, your Honor.

The Court: All right.

Now, at this time gentlemen, I'm prepared to place upon the record a number of decisions relating to various motions made by various defendants concerning this pending trial.

You will all recall that at the conclusion of the hearings conducted back in the last week of the June term, that I reserved decisions on various motions which were pending before me at that time, and at this time I am prepared to read into the record decisions on each of the motions upon which I reserved decision.

Appendix A

First, I will render my decision on the various motions of each of the defendants to suppress evidence.

Each of the three defendants have moved pursuant to Article 710 of the Criminal Procedure Law to suppress or exclude certain evidence proposed to be offered against each of them upon the trial of this indictment. The Defendant Willette has moved to suppress or exclude potential testimony of Suffolk County Police Department Homicide Squad Officers and Assistant District Attorney reciting or describing oral and written statements allegedly made by him while in police custody on the night of September 12th-13th, 1978, on the ground that such statements, if made, were involuntarily made within the meaning of Section 60.45 of the Criminal Procedure Law. In particular, the Defendant Willette, in his affidavit in the motion papers, makes five specific claims of involuntariness:

(A) That he was taken into custody by the police unlawfully;

(B) That his purported waiver of assistance of counsel was obtained by the police in the absence of his attorneys;

(C) That he was denied access to his attorneys by the police and Assistant District Attorney Sullivan after demanding same;

(D) That during a seven-hour period of continuous interrogation he was physically and mentally abused by the police; and

(E) That he was induced to sign a written statement by certain promises and statements made to him by the police and by further promises made to him by Assistant District Attorney Sullivan.

Appendix A

The Defendant Kolb has moved to suppress or exclude potential testimony of Suffolk County Police Department Homicide Squad Officers reciting or describing oral statements allegedly made by him while in police custody on the night of September 13th-14th, 1978 on the ground that such statements, if made, were involuntarily made within the meaning of Section 60.45 of the Criminal Procedure Law. In particular, the Defendant Kolb has orally specified four claims regarding his alleged statements:

(A) That he never made any oral statements whatsoever;

(B) That he was never advised by any police of his Miranda Rights;

(C) That he was physically beaten by the police; and

(D) That he was mentally incompetent at the time of his interrogation by the police.

The Defendant Wagner has moved to suppress or exclude potential testimony of Suffolk County Police Department Homicide Squad Officers reciting or describing oral and written statements allegedly made by him while in police custody in the early morning hours of September 14th, 1978, on the ground that such statements were involuntarily made within the meaning of Section 60.45 of the Criminal Procedure Law. In particular, the Defendant Wagner claims in a supplement to his moving papers, that his statements were obtained by the police "coercively through beatings from the law enforcement officers," and that he was placed in fear of his personal safety.

Appendix A

The allegations of each defendant were denied by the People, and accordingly, a joint evidentiary hearing was conducted before me over a period of five days, to wit, June 18th, 19th, 20th, 21st and 22nd, 1979.

Ten witnesses testified upon the hearing, and 20 hearing exhibits were received into evidence.

The Defendant Willette subsequently submitted a Memorandum of Law in early August.

I have carefully reviewed and considered the hearing testimony of each of the ten witnesses and have given each witness's testimony such credit, belief and weight to which I find same to be entitled. I have also carefully reviewed and considered the contents of each hearing exhibit as such may bear upon the credibility of the testimony of the various witnesses.

The testimony of the various police witnesses, including Det. Rodriguez, Det. Warkenthien, Det. Tosi, Det./Sgt. Misegades and Det./Lt. Dunn, even though differing in minor details, was generally consistent, forthright and credible. There was no indication that their testimony was false or fabricated.

The testimony given by Assistant District Attorney Sullivan was forthright and credible and was consistent with the testimony of Officers Rodriguez, Misegades and Dunn, who were present in the same room when the defendant Willette and Assistant District Attorney Sullivan had a conversation.

There was no indication that Mr. Sullivan's testimony was false or fabricated.

The testimony given by Miss Candace Norton as to the material facts was not credible or worthy of belief. Her

testimony on behalf of the Defendant Willette was inconsistent with her own written statement and she exhibited obvious hostility against the prosecution, and, in addition, had a motive to falsify her testimony in light of her pending civil litigation against the police department.

The testimony given by the Defendant Willette as to the crucial or material facts, was diametrically different from that given by the police witnesses and Assistant District Attorney Sullivan.

Applying the customary tests of credibility to the defendant, Willette's testimony, I find his hearing testimony to be incredible and not worthy of belief.

After such a review and consideration on all of the hearing evidence, I do hereby find, as matters of fact, beyond a reasonable doubt, the following facts essential to the determination of the defendant's motions:

1. In early September, 1978, officers of the Suffolk County Police Department Homicide Squad were actively engaged in the investigation of persons suspected of having participated in the homicidal death of one, Thomas Henderson, which had occurred on or about March 13, 1975, in his home in Blue Point during the course of a burglary and/or robbery.

The three defendants, Kolb, Wagner and Willette, had become suspect by reason of one, Robert Gribbins, having told the police that he, Kolb, Wagner, Willette and another individual had participated together in the crimes. Gribbins agreed to cooperate with the police in the investigation and in their plan to obtain further evidence against his alleged accomplices.

Appendix A

2. On the evening of September 12, 1978, the police outfitted Gribbins with a hidden radio transmitter and gave him the use of an unmarked police car. Gribbins proceeded to the Modell Shopping Center in Centereach with his activities under police visual surveillance and any radio transmissions being monitored and recorded.

At approximately 8:00 p.m., the Defendant Willette and his girl friend, Candace Norton, arrived at the shopping center where they entered Gribbins' car, and a conversation with Gribbins in his car—and had a conversation with Gribbins in his car concerning the Henderson murder, during which conversation Willette made certain incriminatory remarks. This conversation was heard by the surveilling police over the radio. After the car had been driven about and returned to the shopping center, the police believed that the Defendant Willette had become suspicious about Gribbins' car, and it was decided that the Defendant Willette would be taken into custody immediately at the shopping center.

3. At approximately 9:30 p.m., the Defendant Willette was taken into custody at the shopping center by Dets. Zito and Rodriguez. The Defendant Willette was placed into a police vehicle and driven to Homicide Squad Headquarters at Yaphank by these two officers.

During this trip, the Defendant Willette was not interrogated in any manner regarding the crimes, and upon arrival at the Homicide Squad Headquarters the Defendant Willette was taken to and placed in Lt. Dunn's office where Det. Zito remained with him and was joined by Det. Palumbo.

Det. Rodriguez left the Defendant Willette's presence at this point to attend the interrogation of Candace Norton.

4. Candace Norton had been transported from the shopping center to the Homicide Squad Headquarters separately, and upon her arrival she was placed in a separate office where she was interrogated by Det. Tosi and Rodriguez as to her knowledge of the Henderson crimes and the possible involvement of Wagner and Willette.

She told the police about recent incriminatory conduct and statements of Willette and Wagner, which indicated their having participated in the Henderson crimes. Det. Tosi conveyed the information given orally by Miss Norton to other detectives and then prepared a written statement which Miss Norton read and signed (People's Hearing Exhibit #12.)

5. At approximately 11:00 p.m., Lt. Dunn. conducted a joint conference with Det./Sgt. Misegades and Dets. Tosi, Rodriguez and Warkenthien, and they discussed the information which had been provided by Miss Norton. A decision was made after this conference at approximately 11:30 p.m. to interrogate the Defendant Willette. Between the time of his arrival at Homicide Headquarters and 11:30 p.m., the Defendant Willette had been kept in the lieutenant's office in custody of Det. Zito, and during this period there was no interrogation of the Defendant Willette as to the Henderson crimes.

6. At approximately 11:30 p.m., Dets. Rodriguez and Warkenthien entered the lieutenant's office for the purpose

of interrogating the Defendant Willette. After approximately 15 minutes of general conversation, Rodriguez told the Defendant Willette that he had a problem, and at this point orally advised the Defendant Willette of his Miranda Rights. Such advice included his right to remain silent; that anything he did say can and will be used against him in court; his right to talk to a lawyer right now and have him present during interrogation; and his right to an appointed attorney if indigent.

The Defendant Willette stated that he understood his rights and that he didn't need a lawyer; that he hadn't done anything.

Defendant Willette, at this point, also made derogatory remarks regarding the attorney who was presently representing him on an unrelated Burglary/Robbery charge.

This unrelated charge concerned a burglary of a private home on May 3, 1978, and the forcible stealing of property from the occupant. The Defendant Willette and Robert Gribbins had been indicted for these crimes and the criminal action was then pending in the Supreme Court. Attorneys George Sandberg and William Weber were representing the Defendant Willette in this unrelated criminal action, and such fact was known to the Homicide Squad Officers at the time of the Defendant Willette's interrogation on September 12, 1978.

7. After the Defendant Willette waived his right to remain silent and his right to the presence of counsel, Det. Rodriguez commenced his interrogation by telling the Defendant Willette that Gribbins had implicated him in the Henderson crimes and Willette denied any participation.

Rodriguez then told Willette as to the statements of Candace Norton and that Gribbins had been working with the police and had been wired. The Defendant Willette said he didn't believe this. Rodriguez and Warkenthien then began to press Willette, who eventually admitted that he knew Kolb and Wagner and had some knowledge of what had happened at the Henderson home. Willette was then told further details of what the police had learned and at this point he cursed Gribbins and said that he, Willette, had been outside in the car when the crimes occurred.

Det. Rodriguez then asked Defendant Willette to tell him the entire story, and Willette then made a lengthy oral statement in which he admitted his participation with Gribbins, Kolb and Wagner in the events of March 13, 1975, prior to, during and after the commission of the crimes.

These oral statements were completed at approximately 2:00 a.m. on September 13, 1978.

8. Det. Rodriguez then brought up the subject of preparing a written statement, and the Defendant Willette agreed that this be done, but said that he wouldn't sign it. Rodriguez then began to write out, by hand, a written statement (People's Hearing Exhibit #1). As Rodriguez spoke to the Defendant Willette, and incorporated his answers into the written statement, Willette indicated that he would be interested in obtaining a deal, and that he would like to talk to a District Attorney as to this possibility. At this point, Det. Warkenthien left the room and conferred with Lt. Dunn as to Willette's request. At approximately 3:30 a.m., Lt. Dunn placed a telephone call to Assistant District Attorney Sullivan at home and requested him to come to Homicide Squad Headquarters.

Appendix A

In the meanwhile, Det. Rodriguez continued to write out the written statement as the Defendant Willette repeated his previous oral statements as to his participation in the crimes. The written statement was completed but not as yet signed by the Defendant Willette at the time Assistant District Attorney Sullivan arrived at Homicide Squad Headquarters at approximately 4:30 a.m.

9. Upon Assistant District Attorney Sullivan's arrival, he had a private conference with Lt. Dunn, Det./Sgt. Misegades and Dets. Rodriguez and Warkenthien, and was told about the Defendant Willette's oral incriminatory statements and other details as to the present status of the investigation, and that the Defendant Willette wanted to speak with him.

After approximately 15 minutes, Sullivan went to the lieutenant's office where the Defendant Willette was seated and began a conversation with him.

Also present in the office during the entire Sullivan-Willette conversation were Lt. Dunn, Det./Sgt. Misegades and Det. Rodriguez.

10. Sullivan introduced himself to Willette who said he recognized him from the courts in Riverhead. Sullivan then asked Willette how he had been treated by the police, and Willette responded that these guys had treated him okay. Sullivan then orally advised Willette of his Miranda Rights in great detail, and Willette told Sullivan that he understood his rights and acknowledged that the police had previously advised him of his rights before interrogation.

Sullivan next brought up the subject of Willette having a lawyer representing him already on the unrelated Bur-

glary/Robbery charges. Willette told Sullivan that he was dissatisfied with his present lawyer, and that he did not want to contact any lawyer at that time.

Willette told Sullivan that the police had made no promises to him during interrogation, except to tell him that his girl friend, Candace Norton, would not be charged with any crime. The Defendant Willette expressed his complete willingness to talk with Assistant District Attorney Sullivan about his participation in the Henderson crimes.

11. Mr. Sullivan then interrogated Defendant Willette at length as to the contents of the unsigned written statement. Willette told Sullivan that everything he had told the police, and that everything that was contained in the written statement was true and especially emphasized that he had remained in the car at the Henderson house while the others went inside.

The Defendant Willette told Sullivan that he wanted to cooperate with the police and help them to obtain evidence against the others, and asked Sullivan what consideration he would be given for his cooperation.

12. Assistant District Attorney Sullivan then told the defendant in considerable detail as to what the District Attorney would do and what the District Attorney would not do in return for the Defendant Willette's cooperation.

Mr. Sullivan told the Defendant Willette that everything would depend on whether or not he was telling the truth as to his limited participation in the crimes and upon the extent and helpfulness of his cooperation.

Mr. Sullivan told the Defendant Willette that he would be charged with a crime or crimes relating to the events of

March 13, 1975, but made no statement or promise to him as to the exact crime or crimes to be charged.

Mr. Sullivan told the Defendant Willette that he would not be granted immunity from prosecution under any circumstances. Mr. Sullivan specifically told the Defendant Willette that if he was telling them the truth, and that if his cooperation was helpful to the police and the District Attorney in the prosecution of the others, that under such circumstances the District Attorney would consent to the entry of a guilty plea and fully advise the sentencing judge as to the extent and helpfulness of his cooperation as part of any sentence recommendation.

Mr. Sullivan emphasized to the Defendant Willette that he was not making any promise to him as to what sentence he would receive upon a guilty plea, and specifically told Willette that he was not making any promise to him that he would not be sentenced to imprisonment. Sullivan and Willette then discussed whether he was going to sign the written statement, and Sullivan told Willette that this was entirely his choice or decision.

Det. Rodriguez then reviewed the contents of the written statement with the Defendant Willette and Assistant District Attorney Sullivan left the room at that point at approximately 5:15 a.m.

13. The Defendant Willette then read the written statement in the presence of Det. Rodriguez, initialled the corrections and insertions, initialled the rights portion and then signed the written statement at the bottom of each of the five pages. Det. Rodriguez signed as witnessed, and Det. Warkenthien signed as Notary. This occurred at approximately 5:30 a.m.

Appendix A

Assistant District Attorney Sullivan came back into the lieutenant's office at this point and had a brief conversation with Willette about his cooperating with the police in the further investigation of Kolb and Wagner. Sullivan then left the lieutenant's office and prepared handwritten notes as to his activities and conversations that morning (People's Hearing Exhibit #2.)

13-A. After signing the written statement, the Defendandt Willette and his girl friend, Candace Norton, voluntarily remained in police custody for the purpose of Willette's cooperation, the remainder of the day of September 13th, and were both housed in a motel overnight until the following day, September 14th. On the afternoon of September 14, 1978, the Defendant Willette was formally charged with the crimes and photographed (People's Hearing Exhibit #16B.)

The Defendant Willette was arraigned in the District Court of Suffolk County on the morning of September 15, 1978. At the time of his arraignment, his attorney, William Weber, told the District Court Judge of his client's claims as to having been beaten by the police and the Defendant Willette also made remarks in this regard and had a colloquy with the Judge (Defendant's Hearing Exhibit B.)

Upon the Defendant Willette's admission to the Suffolk County Jail later that day, he made further complaints of pain from beating by police. The registered nurse who examined Willette at that time found no objective eviednce of such complaints (People's Hearing Exhibit #13.)

14. I find the Defendant Willette's testimonial version of the events occurring at Homicide Squad Headquarters on the night of September 12th-13th, 1978, to be basically incredible. Contrary to the Defendant Willette's claims or contentions: (A) He was not confined and continuously interrogated in a small closed room by Det. Zito and others for a period of seven hours. (B) He did not tell Det. Zito that he wanted to contact his lawyer or exhibit a lawyer's card to Zito, nor did Zito take any such card, tear it up and tell Willette that he was his lawyer. (C) He was not struck by Zito or any other police officer at any time, nor did Det. Tosi enter the room and stomp upon his feet. (D) He was not told by Det. Rodriguez that Assistant District Attorney Sullivan was "Judge Stark's right-hand man," and that Sullivan could get him immunity by whispering into Judge Stark's ear. (E) Det. Rodriguez did not tell Willette that the written statement would protect his interests, and would guarantee that he would not spend a night in jail and that it would convince Sullivan to promise him immunity. (F) Willette did not tell Assistant District Attorney Sullivan that he had been beaten by the police. Willette did not tell Assistant District Attorney Sullivan that he wanted to contact his lawyers, Weber and Sandberg, and have them present. Assistant District Attorney Sullivan did not tell Willette that he did not need Weber because he, Sullivan, would be, in effect, his attorney. (G) Assistant District Attorney Sullivan never told or promised the Defendant Willette that he would not go to jail and would be given five years probation.

In short, none of this alleged police or prosecutorial misconduct complained of by the Defendant Willette occurred.

15. In summary, therefore, while the Defendant Willette was in the custody of the Suffolk County Police Department Homicide Squad Officers, between 9:30 p.m. on September 12, 1978, and 5:30 a.m. on September 13, 1978: (A) No police officer used or threatened the use of physical force upon him. (B) No police officer engaged in any improper conduct or exerted any undue pressure upon him so as to impair his physical or mental condition to the extent of undermining his ability to make a choice whether or not to make a statement. (C) No police officer or District Attorney made any promise or statement of fact to Willette which created a substantial risk that he might falsely incriminate himself. (D) No police officer or District Attorney in any manner deprived Willette of access to counsel. The Defendant Willette's oral and written statements made on September 12, 13, 1978, were not involuntarily made within the meaning of Section 60.45 of the Criminal Procedure Law. Such statements were voluntarily made by the Defendant Willette.

This concludes my findings of fact concerning the Defendant Willette. I will now continue with my findings of fact concerning the Defendant Kolb.

16. On the evening of September 13, 1978, Suffolk County Police Department Homicide Officers were engaged in a surveillance of the residence of the Defendant Kolb at Adirondack Drive in Farmingville. Gribbins, who was again fitted with a hidden radio transmitter, engaged Kolb in a conversation, but was unable to induce Kolb to leave the house.

At 11:30 p.m., the surveilling police went directly to the house, and the Defendant Kolb was taken into custody by

Det./Sgt. Misegades and Det. Tosi. Kolb was driven to Homicide Headquarters in Yaphank by Det. Tosi. No interrogation took place during this trip, but Kolb kept insisting to the police officers that he was crazy.

17. Upon Defendant Kolb's arrival at Headquarters shortly before midnight, he was placed in the lieutenant's office in the custody of Det. Tosi. Det. Warkenthien entered the room and prior to any interrogation, advised Kolb of his Miranda Rights, reading same from his Suffolk County Police Department Rules of Interrogation card (People's Hearing Exhibit #3.) Such advice included his right to remain silent, that anything he did say can and will be used against him in court, his right to talk to a lawyer right now and have him present during the interrogation and his right to an appointed attorney if indigent.

The Defendant Kolb stated that he understood each of these rights and that he did not need a lawyer. He said he would tell the police anything they wanted to know in that he was crazy anyway.

18. Det. Warkenthien, with Det. Tosi present, then told the Defendant Kolb what they had already learned as to his participation in the crimes and proceeded to interrogate him.

In response to such interrogation, the Defendant Kolb made a lengthy narrative oral statement describing his participation in the crimes, along with his uncle, Gribbins, Willette and Wagner. Det. Warkenthien then asked Kolb if he would sign the rights card, and Kolb said he would not sign anything.

Appendix A

Dets. Warkenthien and Tosi then exhibited to Kolb several police photographs of the Henderson house in Blue Point, one exterior and one interior (People's Hearing Exhibits #4 and 5.) When shown these photographs, the Defendant Kolb pointed to various aspects of them and described how they had entered the house and acknowledged the accuracy of the photographs. When asked, the Defendant Kolb refused to place his initials on the photographs.

The interrogation of the Defendant Kolb was completed at approximately 2:00 a.m. on September 14, 1978.

19. At the time of his interrogation between midnight and 2:00 a.m. on September 14, 1978, the Defendant Kolb was mentally capable of understanding his rights and making a voluntary waiver of his right to remain silent and his right of access to counsel.

When the Defendant Kolb was admitted to the Suffolk County Jail later in the day of September 14, 1978, he made no complaints as to having been beaten by police (People's Hearing Exhibit #15.) However four days later, on September 18, 1978, the Defendant told jail personnel that he was a victim of police brutality and that an officer had kicked him. At that time it was noted that the Defendant Kolb had a small bruise on the inside of his right upper thigh.

20. In summary, therefore, while the Defendant Kolb was in custody of Suffolk County Police Department Homicide Squad Officers between 11:30 p.m. on September 13, 1978 and 2:00 a.m. on September 14, 1978, (A) No police officer used or threatened the use of physical force upon

him. (B) No police officer engaged in any improper conduct or exerted any undue pressure upon him so as to impair his physical or mental condition to the extent of undermining his ability to make a choice whether or not to make a statement. The Defendant Kolb's oral statements made on the early morning hours of September 14, 1978, to Dets. Warkenthien and Tosi, were not involuntarily made within the mtaning of Section 60.45 of the Criminal Procedure Law. Such statements were voluntarily made by the Defendant Kolb.

This concludes my findings of fact concerning the Defendant Kolb. I will now continue with my findings of fact concerning the Defendant Wagner.

21. At approximately 4:00 a.m. on September 14, 1978, various Suffolk County Police Department Homicide Squad Detectives were surveilling the home of the Defendant Wagner in Rocky Point. At this time, the Defendant Wagner came out of his house and started to drive away in a car. The vehicle was stopped by the police, and the Defendant Wagner was taken into custody by Det./Sgt. Misegades and Det. Zito and placed in a police vehicle. At this time Wagner was orally advised of his Miranda Rights by Det. Zito, and the Defendant Wagner responded that he knew his rights.

During the trip to Yaphank there was no interrogation of the Defendant Wagner. Upon arrival at Headquarters in Yaphank, Wagner was taken to a separate room in the Auto Squad section of the building.

22. Det. Zito then conducted the interrogation in the presence of Dets. Tosi and Schwalback. Det. Zito first read

the Miranda Rights to the Defendant Wagner, using his Suffolk County Police Department Rules of Interrogation card (People's Hearing Exhibit #11) Such advice included his right to remain silent, that anything he did say can and will be used against him in court, his right to talk to a lawyer right now and have him present during interrogation, and his right to an appointed attorney if indigent. Wagner responded that he knew all of this already; that he understood his rights and did not want a lawyer and was willing to talk to the police.

23. Det. Zito then interrogated the Defendant Wagner as to his participation in the Henderson crimes. Wagner became very emotional as he was questioned. He was told by Zito that Gribbins, Willette and Kolb had already implicated him, and at this point the Defendant Wagner agreed to give a statement.

Det. Zito then took a yellow pad and as the Defendant Wagner made his oral statement, Zito wrote down his responses and incorporated them into a narrative written statement (People's Hearing Exhibit #10.)

In this statement, the Defendant Wagner admitted his own participation in the crimes and described the participation of Gribbins, Kolb and Willette.

The taking of the written statement encompassed a period of approximately two hours and was completed at approximately 6:00 a.m. The Defendant Wagner then read the entire written statement, initialled the rights portion and various corrections, and signed his name at the bottom of each of the six pages. Det. Zito signed as witness, and Det. Tosi signed as Notary.

At this point, Defendant Wagner also initialled Det. Zito's Miranda Rights card (People's Hearing Exhibit #11.)

24. The Defendant Wagner was then taken by Det. Tosi to the secretary's area of the Homicide Squad for processing. In the presence of Det. Warkenthien, at approximately 7:00 a.m., Wagner was shown four police photographs of the interior of the Henderson house, which he identified and initialled each on the rear side (People's Hearing Exhibits #6, 7, 8 and 9.)

25. When the Defendant Wagner was admitted to the Suffolk County Jail later in the day of September 14, 1978, he made no complaints as to having been beaten by the police (People's Hearing Exhibit #14.) However, on the following day, September 15, 1978, the Defendant Wagner complained to jail personnel that the police had beaten him by punching him in the face and ribs at Yaphank. His physical examination made, after this complaint, did not disclose any objective pathology of any such claimed injuries.

26. In summary, therefore, while the Defendant Wagner was in custody of Suffolk County Police Department Homicide Squad Officers, between 4:00 a.m. and 7:00 a.m., on September 14, 1978, (A) No police officer used or threatened the use of physical force upon him. (B) No police officer engaged in any improper conduct or exerted any undue pressure upon him so as to impair his physical or mental condition to the extent of undermining his ability to make a choice whether or not to make a statement. The

Appendix A

Defendant Wagner's oral and written statements made on the early morning hours of September 14, 1978 were not involuntarily made within the meaning of Section 60.45 of the Criminal Procedure Law. Such statements were voluntarily made by the Defendant Wagner.

Based upon all of the above facts found, I do hereby conclude, as matters of law, as follows: First, as to the Defendant Willette:

1. The Defendant Willette was taken into custody at the Modell Shopping Center on the evening of September 12, 1978, lawfully. At such time the police had lawful authority to hold and interrogate the Defendant Willette as to the Henderson crimes.

As a result of their prior investigation, including the information given them by Robert Gribbins and the overheard radio transmissions of the Gribbins-Willette conversation that evening, the police had reasonable cause to believe that the Defendant Willette had participated in the commission of the crimes, and his actual arrest without a warrant for such crimes would have been lawful under the provisions of Article 140 of the Criminal Procedure Law.

2. At the time the Defendant Willette waived his right to the assistance of counsel during the night of September 12th-13th, 1978, no attorney had entered the proceedings on Defendant Willette's behalf, and the Defendant Willette's happenstance representation by Attorneys Weber and Sandberg in the unrelated Burglary/Robbery criminal action is insufficient to invoke the Hobson Rule. (People against Clar, 41 NY 2d 612) and (People against Rolston, 66 App. Div. 2d 617).

3. There was no violation of the Defendant Willette's constitutional rights as to the required pre-interrogation warnings, and waivers under the mandate of Miranda against Arizona (384 U.S. 436.)

4. There was no violation of the Defendant Willette's constitutional rights of access to counsel.

The potential testimony of Suffolk County Police Department Homicide Squad Officers and Assistant District Attorney Sullivan reciting or describing the Defendant Willette's oral and written statements, and the written statement itself, is admissible in evidence against the Defendant Willette upon the trial of this indictment.

Secondly, as to the Defendant Kolb:

1. There was no violation of the Defendant Kolb's constitutional rights as to the required pre-interrogation warnings and waivers under the mandate of Miranda against Arizona (384 U.S. 436.)

2. There was no violation of the Defendant Kolb's constitutional rights of access to counsel.

3. The potential testimony of Suffolk County Police Department Homicide Squad Officers reciting or describing Defendant Kolb's oral statements is admissible in evidence against the Defendant Kolb upon the trial of this indictment.

Thirdly, as to the Defendant Wagner:

1. There was no violation of the Defendant Wagner's constitutional rights as to the required pre-interrogation

warnings and waivers under the mandate of Miranda against Arizona (384 U.S. 436).

2. There was no violation of the Defendant Wagner's constitutional rights of access to counsel, and

3. The potential testimony of Suffolk County Police Department Homicide Squad Officers reciting or describing the Defendant Wagner's oral and written statements, and the written statement itself, is admissible in evidence against the Defendant Wagner upon the trial of this indictment.

Accordingly, the motions of each respective defendant, to suppress such evidence, is denied.

The District Attorney is directed to prepare and submit a written Order based upon this oral decision.

All right. Each of the defendants have an exception to my denial of the motion.

Now, I am prepared as to additional decisions as to other undetermined motions relating to the two of the defendants.

The Defendant Willette has separately moved to dismiss the indictment pursuant to Section 210.40 and Section 210.20 Subdivision 1, of the Criminal Procedure Law in furtherance of justice. The grounds of this motion are threefold:

1. That the defendant has been prejudiced by the three-and-a-half-year interval between the date of the commission of the crimes and the commencement of the criminal action.

2. That promises were made to the defendant by the District Attorney that he "would be granted probation and

would never spend a night in jail," if he cooperated with the police, and that the People have failed to carry out such promise, and

3. That the defendant did in fact cooperate with the police in obtaining evidence against the other co-defendants, and in doing so, placed his life in jeopardy.

Prior to the Defendant Willette's present motion to dismiss, which is dated May 31, 1979, the same defendant had earlier moved to dismiss the indictment on the ground of substantial prosecutorial misconduct.

On May 17, 1979, I made an interim decision on that motion directing that a hearing take place as to the exact nature of the District Attorney's alleged promise and the alleged misconduct. Such hearing took place contemporaneously with the hearing held on Defendant Willette's motion to suppress and all of the facts relating to the Defendant Willette's complaints of injustice were fully explored during such hearing.

I, therefore incorporate in this decision all of my findings of fact made in regard to the Defendant Willette in my suppression hearing decision rendered earlier today.

Based upon all of the facts found after such hearing, there are no compelling factors, considerations or circumstances which clearly demonstrate that conviction or prosecution of the Defendant Willette upon the indictment would constitute or result in injustice. Accordingly, Defendant Willette's motion to dismiss the indictment in furtherance of justice, is denied.

Defendant Willette has an exception to my decision in that regard.

Appendix A

The Defendant Willette has also separately moved, pursuant to the provisions of Section 200.40, Subdivision 1 of the Criminal Procedure Law, to be tried separately from the other defendants, Kolb and Wagner.

In view of the grounds urged by the Defendant Willette in support of such motion, I have deferred decisions thereon until after the completion of the extensive hearing held on the three defendants' motions to suppress. During such hearing, all of the facts concerning the interrogation of each of the three defendants were fully explored, as well as the contents of their respective incriminatory statements made to the police.

I, therefore, incorporate in this decision, all of my findings of fact made in my suppression hearing decision rendered earlier today.

I've carefully compared the incriminatory statements made by each defendant. Defendant Willette's oral and written statements incriminate himself in the planning and commission of the crimes, as well as the defendants Kolb and Wagner.

Defendant Kolb's oral statement incriminates himself in the planning and commission of the crimes, as well as the Defendants Willette and Wagner.

Defendant Wagner's oral and written statements incriminate himself in the planning and commission of the crimes, as well as the Defendants Kolb and Willette.

The only difference between Willette's statements, and those of Kolb and Wagner, is that the Defendant Willette states that he remained outside in the car at the time his accomplices were inside the house committing the crimes, while the Defendants Kolb and Wagner state that the De-

fendant Willette accompanied them into the house and participated in the crimes. This difference in the statements is not a material one in view of the charge made in the indictment that all three defendants conspired together to commit the crime of Burglary and Robbery at the Henderson house.

It is well settled that where each defendant has made a full and voluntary confession, which is almost identical to the confessions of his co-defendants, that the Bruton Rule does not require a severance and separate trial. (People against McNeil, 24 NY 2d, 550) and (People against Safian and Miner, 46 NY 2d 181.)

Accordingly, the motion of the Defendant Willette for a separate trial is denied. Defendant Willette has an exception to my ruling.

Now, as to the Defendant Kolb: On June 8, 1979, the Defendant Kolb moved for a hearing in connection with his previous motion to dismiss the indictment in furtherance of justice pursuant to Section 210.40 and Section 210.20 Subdivision 1 of the Criminal Procedure Law. The original motion to dismiss was fully considered by me in the month of May, 1979, and on May 17, 1979 I rendered a written decision denying such motion.

At the time the hearing was conducted upon the Defendant Kolb's motion to suppress the evidence during the week of June 18, 1979, I afforded the Defendant Kolb's attorney full opportunity to present factual evidence which would tend to support his motion to dismiss. No such further factual evidence was presented at the hearing.

Based upon the hearing evidence, there are no compelling factors, considerations or circumstances which

clearly demonstrate that conviction or prosecution of the Defendant Kolb upon the indictment would constitute or result in injustice.

Accordingly, I adhere to my decision of May 17, 1979, and the Defendant Kolb's motion to dismiss the indictment in furtherance of justice is denied.

Defendant Kolb has an exception to my denial of his motion.

All right, gentlemen, have you been fully advised by the District Attorney as to my present engagement in another homicide trial? The trial of this indictment must permit me to keep subject to the present trial.

Have you all been advised?

Mr. O'Leary: Yes, your Honor.

Mr. Vuturo: Yes, your Honor.

Mr. Thompson: Yes, your Honor.

The Court: How long do you contemplate that the People will be engaged in the Grant Homicide trial, Mr. Spota?

Mr. Spota: I think that from my conversation with Mr. Folks, that he anticipates the hearings to conclude probably tomorrow and it would take approximately another two weeks to two and a half weeks to complete the trial.

The Court: All right. So this, the trial of this indictment against Kolb, Wagner and Willette could not commence earlier than the week of the 24th of September?

Mr. Spota : I think that that would be a reasonable estimate; yes.

The Court: All right. What I am going to do is mark the trial of this indictment to be ready subject to the com-

pletion of the Grant Homicide trial, and for control purposes, the matter will again appear on my calendar on Monday, September 24th. I would urge all of you to keep in touch with the District Attorney as to the status of the Grant trial. If any should occur which would terminate that trial at an earlier date, I then would direct this trial to proceed immediately.

Mr. Vuturo: Are we getting a written copy of the decision?

The Court: No. If you wish to order one from the steno, you can order it. You can obtain that at the county expense.

Mr. Vuturo: All right.

The Court: All right. You will appear before me, gentlemen, on Monday, the 24th of September.

* * *

CERTIFICATION is given hereby that the foregoing is a true, correct and complete transcript of the stenographic minutes taken herein by me on the 5th day of September, 1979.

/s/ VINCENT J. RESTIVO

Vincent J. Restivo,
Official Court Reporter.

APPENDIX B

Appellate Division Opinion and Order

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on March 22, 1982

HON. VINCENT D. DAMIANI, Justice Presiding,
HON. VITO J. TITONE,)
HON. WILLIAM C. THOMPSON,) *Associate Justices*
HON. LAWRENCE J. BRACKEN.)

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

v.

ROBERT WILLETTE,
Appellant.

In the above entitled action, the above named Robert Willette, defendant in this action, having appealed to this court from a judgment of the Supreme Court, Suffolk County, rendered November 23, 1979, convicting him of manslaughter in the first degree (to cover indictment numbers 2224/78 and 1313/78), upon his plea of guilty, and imposing sentence; said appeal brings up for review the denial, after a hearing, of defendant's motion to suppress his statements to the police and to an Assistant District Attorney; and the said appeal having been argued by Louise Perrotta, Esq., of counsel for the appellant, and

Appendix B

argued by Vincent A. Malito, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is:

Ordered that the judgment appealed from is hereby unanimously reversed, on the law, defendant's motion is hereby granted, the plea is hereby vacated, and the case is hereby remitted to the Supreme Court, Suffolk County, for further proceeding on indictment numbers 1313/78 and 2224/78.

Enter:

Irving N. Selkin
Clerk of the Appellate Division

Appendix B

E/ta

VINCENT D. DAMIANI, J.P.
VITO J. TITONE
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN, JJ.

——AD2d——

A—January 12, 1982

3236E

THE PEOPLE, ETC.,

respondent,

v.

ROBERT WILLETTE,

appellant.

(Ind. No. 2224/78)

John F. Middlemiss, Jr., Stony Brook, N.Y. (Louise Perrotta of counsel), for appellant.

Patrick Henry, District Attorney, Riverhead, N.Y. (Vincent A. Malito of counsel), for respondent.

Appeal by defendant from a judgment of the Supreme Court, Suffolk County (STARK, J.), rendered November 23, 1979, convicting him of manslaughter in the first degree (to cover indictment numbers 2224/78 and 1313/78), upon his plea of guilty, and imposing sentence. The judgment brings up for review the denial, after a hearing, of defendant's motion to suppress his statements to the police and to an Assistant District Attorney.

Judgment reversed, on the law, defendant's motion is granted, the plea is vacated, and the case is remitted to the Supreme Court, Suffolk County, for further proceedings on indictent numbers 1313/78 and 2224/78.

When the police arrested defendant for the crimes charged in indictment number 2224/78, they knew that he was represented by an attorney with respect to indictment number 1313/78. Accordingly, the statements which they elicited from defendant, and the statements subsequently elicited by an Assistant District Attorney, must be suppressed (see *People* v *Rogers*, 48 NY2d 167).

DAMIANI, J.P., TITONE, THOMPSON and BRACKEN, JJ., concur.

March 22, 1982 PEOPLE v WILLETTE, ROBERT 3236E

APPENDIX C

Certificate Denying Leave

STATE OF NEW YORK
COURT OF APPEALS

Before:
HON. SOL WACHTLER, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK
Appellant

against

ROBERT D. WILLETTE

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Mineola, New York
May 27, 1982

/s/ SOL WACHTLER
Associate Judge

---

* Description of Order: Judgment of Supreme Court, Suffolk, November 23, 1979; reversed, plea vacated and case remitted to Supreme Court, Suffolk, for further proceedings by Appellate Division, Second Department, March 22, 1982.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-349

THE PEOPLE OF THE STATE OF NEW YORK, Petitioner

v.

ROBERT D. WILLETTE, Respondent

The respondent, Robert D. Willette, who is now held in the Suffolk County Correctional Facility in the State of New York, asks leave to file the attached Brief in Opposition to a Writ of Certiorari to the New York State Supreme Court, Appellate Division, Second Judicial Department without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The respondent's affidavit in support of this motion is attached hereto.

LOUISE ANTOINETTE PERROTTA
Counsel for Respondent
Legal Aid Society of Suffolk County
Appeals Bureau
S.U.N.Y. at Stony Brook
Melville Library, Suite N-4061
Stony Brook, New York 11790

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 82-349

THE PEOPLE OF THE STATE OF NEW YORK, Petitioner

v.

ROBERT D. WILLETTE, Respondent

AFFIDAVIT

I, Robert D. Willette, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis pursuant to Rule 53: 1. I am the respondent in the above-entitled case; 2. Because of my poverty I am unable to pay the costs of said cause or to pay for the printing and reproduction costs of the necessary papers in said cause; 3. I am unable to give security for the same; 4. I have been incarcerated since my conviction and sentence on November 23, 1979 and remain incarcerated despite the reversal of my conviction on March 22, 1982 due to my inability to post my bail which was set in April; 5. I had requested to appeal my conviction to the New York State Supreme Court, Appellate Division, Second Judicial Department in forma pauperis and that request was granted and the Legal Aid Society of Suffolk County was assigned as my counsel. [Order of

that Court attached hereto]; 6. I believe that I am entitled to answer and oppose the petitioner's request for certiorari; 7. The nature of said cause is briefly stated as follows:

I was sentenced to a New York State Correctional Facility by the Supreme Court of the State of New York, County of Suffolk, after pretrial hearings on my motions for suppression of statements, severance and to have the trial judge recuse himself (all of which were denied) and my plea to Manslaughter in the First Degree under Indictment # 2224/78 in satisfaction of that indictment and Indictment # 1313-78. I appealed the above determination and conviction in forma pauperis to the New York State Supreme Court, Appellate Division, Second Judicial Department requesting dismissal of the indictment in the interests of justice, suppression of the involuntarily obtained statements and reduction of the excessive sentence. That Court reversed my conviction, suppressed my statements and remanded to the trial court for further proceedings (which are being held in abeyance pending determination of the instant petition for certiorari). Both the petitioner herein and respondent sought and were denied leave to appeal to the New York State Court of Appeals -- the court of last resort in New York State. The petitioner now seeks certiorari to view the New York State Court of Appeals interpretation of the New York State Constitutional provision granting a more expansive right to counsel than provided for by the Federal Courts interpretations of the Federal Constitution.

Robert D Willette
ROBERT D. WILLETTE

Duly witnessed and sworn to before me, a Notary Public, this 10th day of September, 1982.

Frank A. Bacile

FRANK A. BACILE
NOTARY PUBLIC, State of New York
No. 52-4726892 Qual. in Suffolk Co.
Commission Expires March 30, 1984

No. 96

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County, on January 14, 1980.

HON. MILTON MOLLEN, Presiding Justice
HON. JAMES D. HOPKINS)
HON. VINCENT D. DAMIANI) Associate Justices
HON. VITO J. TITONE)

RECEIVED
JAN 21 1980
COURT OF APPEALS
APPELLATE DIVISION
APPELLATE TERM

The People of the State of New York,

Respondent,

v.

Robert D. Willette,

Appellant.

Decision and Order-
Motion to Dispense With Printing and to Assign Counsel - Appeal from Judgment.

Ind. No. 2224/78

In the above-entitled action, the above-named appellant (defendant) having appealed to this court from a judgment of the Supreme Court, Suffolk County, rendered November 23, 1979, and appellant having moved to dispense with printing and for assignment of counsel;

Now, upon the papers filed in support of the motion and papers filed in opposition or relating thereto; and the motion having been duly submitted and due deliberation having been had thereon, it is

ORDERED that the motion is hereby granted.

The appeal will be heard on the original papers (including a typewritten certified transcript of the stenographic minutes) and on appellant s and respondent s briefs, which may be in legible typewritten form or in any other legible form authorized by this court's rules and which must comply with said rules (22A NYCRR 670.1 et seq.)

The parties are directed to file eight copies of their respective briefs and to serve one copy on each other.

The stenographer of the trial court is required promptly to make, certify and file two typewritten transcripts of the stenographic minutes of the proceedings of the pretrial hearings, plea of guilty and sentence, unless a daily copy of a transcript has been ordered by the court (22A NYCRR 671.9); in either event, the clerk of the trial court shall furnish one of such certified transcripts to appellant s counsel, without charge (CPL 460.70).

Pursuant to statute (County Law, § 722), the following named attorney is assigned as counsel to prosecute the appeal:

John F. Middlemiss, Jr., Atty in Charge, Legal Aid Society, Suffolk County, NY, Appeals Bureau, P.O. BOX "O", Stony Brook, N.Y. 11790.

Appellant s time to perfect the appeal is enlarged. Assigned counsel shall prosecute the appeal expeditiously in accordance with this court's rules (22A NYCRR 670.1 et seq.) and written directions.

When the assigned counsel serves his brief on the District Attorney, he is required also to serve his copy of the minutes on the District Attorney.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division
Date: 1/14/80 No. 96

Defendant's address:

79 A 3870
354 Hunter St.
Ossining, N.Y.

AFFIDAVIT OF PERSONAL SERVICE

LOUISE ANTOINETTE PERROTTA being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at Lindenhurst, New York.

On September 22nd, 1982, deponent served the within Motion to Proceed in Forma Pauperis, Affidavit in Support of that Motion and three copies of a Brief in Opposition to a Writ of Certiorari to the New York State Supreme Court, Appellate Division Second Judicial Department, upon the District Attorney of Suffolk County (Appeals Bureau) at the Criminal Courts Building, Center Drive South, Riverhead, New York, 11901, the address designated by said District Attorney for that purpose, by delivering a true copy (three copies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Petitioner therein.

Louise Antoinette Perrotta

LOUISE ANTOINETTE PERROTTA

Sworn to before me this
22nd day of September, 1982

Monroe Alan Semble

Notary Public

MONROE ALAN SEMBLE
NOTARY PUBLIC, State of New York
No. 30-4746456
Qualified in Nassau County
Term Expires March 19

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I, Vincent A. Malito, being associated with the Suffolk County District Attorney's Office (Appeals Bureau) have received this date (September 22nd, 1982) Motion to Proceed in Forma Pauperis, Affidavit in Support of that Motion and three copies of a Brief in Opposition to a Writ of Certiorari to the New York State Supreme Court, Appellate Division, Second Judicial Department, in the matter of People v. Robert D. Willette.

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SUPREME COURT, U.S.

No. 82-349

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1982

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

ROBERT D. WILLETTE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

JOHN F. MIDDLEMISS, JR.
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LOUISE ANTOINETTE PERROTTA, ESQ.
Staff Attorney
Of Counsel

INDEX

Page

Table of Cases

Opinions Below.....2-3

Jurisdiction.....4

Questions Presented.....5

Constitutional Provisions/Statutes Involved.....6-8

Statement of the Case.....9-15

Arguments

Question Number One
Does jurisdiction lie in this Court to review the petition where the issue is a state court's interpretation of its own state constitution thus granting greater rights for its citizens? 16-19

Question Number Two
Do State Courts have the ability to interpret their own state constitutions in a manner so as to give their citizens greater rights that the minimum rights guaranteed under the United States Constitution as interpreted by the Federal Courts? 19-26

Question Number Three
Does the additional protection, provided by the Courts of New York deprive that accused of his Federal Constitutional right to self representation by mandating that waiver of the right to an attorney is permitted, but only in the presence of an attorney? 27-29

Question Number Four
Do the rights alluded to under the Ninth and Fourteenth Amendments to the United States Constitution, encompass a "right of the public to be protected from criminals who freely and voluntarily admit to the police the commission of a felony"? If so,

does the right of a defendant, under the New York Court of Appeals interpretation of the New York State Constitution violate this right? 29-32

Conclusion.....32

Appendices

Page

"A" - Hearing Decision - See Petitioner's "A" A1

"B" - Appellate Division Decision See Petitioner's "B" A1

"C" - Court of Appeals Denial of Leave - See Petitioner's "C" A1

"D" - People v. Rogers A2-A14

"E" - People v. Bartolomeo A15-A31

TABLE OF CASES

	Page
Federal Cases	
Addington v. Texas, 441 U.S. 418 (1979)	21
Chambers v. Florida, 309 U.S. 227 (1940)	21, 27
Dept. of Mental Hygiene of California v. Kirchner, 380 U.S. 194 (1965)	18
Fay v. Noia, 372 U.S. 391 (1963)	18
Fox Film Corp. v. Muller, 296 U.S. 207 (1935)	17
Klinger v. Missouri, 13 Wall. 257	17
Jenkins v. Anderson, 447 U.S. 231 (1980)	22
Jones v. United States, 362 U.S. 257 (1960)	22
Michigan v. Tucker, 417 U.S. 433 (1974)	22
N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958)	17
Ohio v. Gallagher, 425 U.S. 257 (1976)	18
Patterson v. New York, 432 U.S. 197 (1979)	21, 24
PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980)	17, 21, 22, 24
United States v. Salvucci, 448 U.S. 83 (1980)	23
Wainwright v. Sykes, 433 U.S. 72 (1977)	18
New York State Cases	
People v. Adams, 53 N.Y.2d 239 (1981)	21, 22 24
People v. Bartolomeo, 53 N.Y.2d 225 (1981)	17, 21 25
People v. Blake, 35 N.Y.2d 331 (1974)	22
Cooper v. Morin, 49 N.Y.2d 69 (1979)	22
People v. Hawkins, 55 N.Y.2d 474 (1982)	22
People v. Hobson, 39 N.Y.2d 479 (1976)	21, 22 27
People v. Ponder, 54 N.Y.2d 160 (1981)	22, 23
People v. Rogers, 48 N.Y.2d 167 (1979)	17, 20 21, 22 25, 26, 29
People v. Servidio, 54 N.Y.2d 951 (1981)	26
People v. Smith, 54 N.Y.2d 954 (1981)	26

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PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF
NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT

The respondent, Robert D. Willette, respectfully prays that the petition for writ of certiorari to review the order and opinion of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, entered in this proceeding on March 22, 1982 be dismissed for lack of jurisdiction or that such writ be denied.

OPINIONS BELOW

A suppression hearing was held before the trial court to determine the admissibility of statements secured from respondent-defendant. Respondent-defendant contended that these statements were involuntarily obtained due to the denial of his right to an attorney, his being questioned without an attorney although he had an attorney in an unrelated criminal matter, brutality and psychological coercion, during a seven (7) hour period of continuous interrogation, and due to promises. The trial court denied the motion to suppress in all respects. [trial court's oral decision, see Petitioner's Appendix "A"] Respondent-defendant then pled to a reduced charge and was sentenced.

On appeal to the Appellate Division, Supreme Court, Second Judicial Department, respondent-defendant requested dismissal in the interest of justice or suppression of the statement on the above grounds as well as the unnecessary sixty-one (61) hour delay in arraignment, the trial court's failure to recuse itself and hearing court errors. That Court reversed the conviction on the law and sup-

pressed the statements based upon the fact that respondent had an attorney on a pending matter known to the police and the statement was obtained in the absence of that attorney. [citing People v. Rogers, 48 N.Y. 2d 167 (1979)][See Appellate Division order and decision - Petitioner's Appendix "B"]

The petitioner-plaintiff sought leave to appeal to the New York State Court of Appeals and respondent-defendant cross appealed. Both requests were denied. [See denials by Judge Sol Wachtler - Petitioner's Appendix "C"]

JURISDICTION

The petitioner seeks certiorari to review an order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, dated March 22, 1982 suppressing statements obtained from respondent as obtained in violation of respondent's right to counsel as guaranteed by the New York State Constitution as interpreted by the New York Court of Appeals. Petitioner invokes jurisdiction of the Court pursuant to 28 U.S.C. Section 1257(3).

Respondent contends that no jurisidiction lies since the issue involves a state court's interpretation of its own state constitution so as to grant more rights to its citizens. [argument set forth below - Question Number ONE]

QUESTIONS PRESENTED

Question 1

Does jurisdiction lie in this Court to review the petition for writ of certiorari?

Question 2

Do State Courts have the ability to interpret their own state constitutions in a manner so as to give their citizens greater rights than the minimum rights guaranteed under the United States Constitution as interpreted by the Federal Courts?

Question 3

Does the additional protection, provided by the Courts of New York deprive that defendant of his Federal Constitutional right to self representation by mandating that waiver of the right to an attorney is permitted, but only in the presence of an attorney?

Question 4

Do the rights alluded to under the Ninth and Fourteenth Amendments to the United States Constitution, encompass a "right of the public to be protected from criminals who freely and voluntarily admit to the police the commission of a felony"? If so, does the right of a defendant, under the New York Court of Appeals interpretation of the New York State Constitution violate this right?

CONSTITUTIONAL PROVISION/STATUTES INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT [V.]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI.]

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

NEW YORK STATE CONSTITUTION

ARTICLE 1 §6

§6. [Grand jury; waiver of indictment; right to counsel; informing accused; double jeopardy; self-incrimination; waiver of immunity by public officers; due process of law]

No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury, except that a person held for the action of a grand jury upon a charge for such an offense, other than one punishable by death or life imprisonment, with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney; such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his counsel. In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general

The power of grand juries to inquire into the wilful misconduct in office of public

officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law.

UNITED STATES CODE, 28 U.S.C. 1257(3)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646. 62 Stat. 929.

STATEMENT OF THE CASE

On March 13, 1975 Thomas Henderson died at his home in Blue Point, New York. It was later alleged that his death was the result of injuries inflicted when he was beaten with a baseball bat. There was no progress in the case for over three years.

In May of 1978 Robert Charles Gribbons was arrested for Burglary in the First Degree and Robbery in the Second Degree (Indictment #1313-78). He faced treatment as a second felony offender. In consideration for a reduced plea to Burglary in the Second Degree on the above indictment and for not being charged with Murder in the Second Degree, Robbery in the First Degree, Burglary in the First Degree and Conspiracy in the Second Degree (as were the defendants below), Gribbons agreed to cooperate with police on the Henderson homicide. Gribbons alleged that five persons were at the Henderson home at the time of Henderson's death: himself, Kevin Kolb, Ronald

James Kolb, Glen Edward Wagner and respondent.[1]

On September 12, 1978 at 8 P.M. Gribbons, who was wearing a wire, met with respondent and his girlfriend, Candace Norton. They drove around in an unmarked police car and talked.

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1. The dispositions as to these persons are as follows:

Robert Charles Gribbons was not charged under Indictment #2224-78. He pled to a reduced charge of Burglary in the Second Degree under Indictment #1313-78 and was sentenced as a Second Felony Offender to 3-6 years (Stark, J.), concurrent to his conviction under W-1414 to a reduced charge of Burglary in the Second Degree on which he received 2-6 years.

Kevin Kolb died prior to any charges.

Ronald James Kolb was convicted under Indictment #2224-78 after pretrial hearings and a jury trial. He was sentenced to 25-life for Murder in the Second Degree, 8 1/3-25 years for Burglary in the First Degree and 0-4 years for Conspiracy in the Second Degree (Stark, J.). Kolb's appeal of his convictions have not yet been perfected. He is incarcerated.

Glen Edward Wagner was convicted under Indictment #2224-78 after pretrial hearings and a jury trial. He was sentenced in absentia, after he absconded, for the same crimes and terms as Kolb above. Wagner is presently incarcerated and his appeal has not yet been perfected.

Respondent pled guilty after pretrial hearings to Manslaughter in the First Degree in satisfaction of Indictment #1313-78 and 2224-78 and was sentenced to 0-12 years (Stark, J.). On appeal to the Appellate Division, the conviction was reversed, the statements suppressed and the case remanded for further proceedings. Permission for leave to appeal to the New York State Court of Appeals was denied. Petitioner brought a petition for certiorari. Respondent remains incarcerated as a pre-trial detainee unable to post the bail placed on him.

Police, fearing that respondent had become suspicious of Gribbons, took respondent into custody at 9:30 P.M. Both respondent and his girlfriend, who was neither arrested nor charged, were transported to the Homicide Squad Headquarters. She was questioned and police allegedly obtained a statement. Although Miss Norton claimed that she had been threatened, psychologically coerced and verbally abused, the hearing court determined that this was not the case and that the statement was voluntarily given.

Interrogation of respondent, according to police, began at about 11:30 P.M. (respondent stated it was 8:30 P.M.) on September 12, 1978 and the oral statements were concluded by 2 A.M. on September 13th. Respondent had stated that during this time he was not given his Miranda rights, was denied access to an attorney despite his request, was not allowed to contact his attorney who represented him on an unrelated pending criminal matter (and whom police and the Assistant District Attorney were aware of), was beaten, threatened and promised no jail time to

induce cooperation. He stated that he, nevertheless, did not make any statement until later. The hearing court held the above to be untrue and the statement to have been voluntarily given. Police alleged that a statement was written up but that respondent refused to sign. Assistant District Attorney Sullivan was then contacted at 3:30 A.M., arrived at 4:30 A.M. and spoke to respondent. Respondent stated that Sullivan also made promises of no jail but Sullivan denied this and the hearing court believed him. Sullivan admitted knowledge of respondent's present attorney but alleged that respondent did not want that attorney and waived the right to an attorney. Sullivan left at 5:15 A.M. and respondent signed the statement at 5:30 A.M. on September 13th.

Respondent, who had still not been charged, and his girlfriend remained in police custody on September 13th. Respondent wore a wire for and assisted the police in their investigation. Respondent (still uncharged) and his girlfriend were held in a motel overnight (police claimed they were free to leave but there was a guard with them constantly). Respondent remained in custody on September 14th but his girlfriend was released.

At about 4 P.M., A.D.A. Sullivan spoke to respondent's attorney (who was representing respondent on an unrelated matter) by telephone about the instant case. Respondent was charged in the afternoon of September 14th. He was finally arraigned on September 15th.

A joint pretrial suppression hearing (for Kolb, Wagner and respondent) was held. The trial court, in an oral decision on September 5, 1979, found in favor of the petitioner in all respects and denied suppression of the statements.

> [On September 13, 1979, the New York State Court of Appeals held, in People v. Rogers, 48 N.Y.2d 167 (1979), that where a defendant has been arrested and is at that time represented by an attorney in an unrelated pending criminal matter then no questioning may be conducted nor may a waiver be secured in the absence of that attorney.]

Appellant then pled to Manslaughter in the First Degree on October 2, 1979 as to Indictment #2224-78, in satisfaction of that indictment and of Indictment #1313-78. He was sentenced to 0-15 years (Stark, J.).

Respondent appealed to the New York State

Supreme Court, Appellate Division, Second Judicial Department requesting dismissal of the indictment in the interests of justice or suppression of the statements and reduction of the sentence. He presented his contentions of brutality, promises, threats, denial of a right to an attorney (no Miranda, requested but denied an attorney, inability to waive right to an attorney, in the absence of his presently retained attorney), 61 hour delay in arraignment, failure of the trial court to recuse itself and hearing errors. That Court reversed the conviction and suppressed the confession based upon People v. Rogers, supra, holding that no waiver of the right to an attorney who is appearing in a pending unrelated matter can be effective when made in the absence of that attorney. That Court did not address respondent's remaining arguments. The case was remanded to the trial court for further proceedings. Those proceedings were delayed pending further appeal and the instant petition for certiorari. (order dated March 22, 1982)

Petitioner now seeks a writ of certiorari from this Court. (filed August 24, 1982 for the October 1982 Term) Respondent opposes the granting of this writ.

QUESTION NUMBER ONE

Does jurisdiction lie in this Court to review the petition where the issue is a state court's interpretation of its own state constitution thus granting greater rights for its citizens?

The petitioner, by their jurisdictional statement, invokes the jurisdiction of this Court pursuant to 28 U.S.C. 1257(3) which reads as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
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> . . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

The instant jurisidiction is defective and the petition for writ of certiorari should be denied.

Clearly only the second clause of 28 U.S.C. 1257(3) is even arguably relevant. The issue herein is the ability of a state to interpret its own state constitution independently of and in magnification, not diminution, of the minimal

rights guaranteed by the United States Constitution. This Court held that, for purposes of this statute, a constitutional provision is a "statute" within the meaning of 28 U.S.C. 1257. PruneYard Shopping Center v. Robins, 447 U.S. 74, 100 S. Ct. 2035 (1980). This statute merely allows review - it does not mandate such review. Review should be denied for the reasons set forth in this and the subsequent arguments.

The state's decisions being contested herein are People v. Rogers, 48 N.Y.2d 167 (1979) and People v. Bartolomeo, 53 N.Y.2d 225 (1981). Rogers was specifically decided by the New York State Court of Appeals based upon the New York Constitution not the United States Constitution. People v. Rogers, supra at 171.

It has long been held by this court that

> . . . where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, [this court's] jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935) [See also National Association for the Advancement of Colored People v. Alabama, 357 U.S. 449 (1958)]

This Court has adhered to this principle from as far back as Klinger v. Missouri, 13 Wall 257,

263. In a recent decision this Court has, consistently with the above, stated that

> [a]s to the role of adequate and independent state grounds, it is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in federal courts. Wainwright, Secretary, Department of Offender Rehabilitation of Florida v. Sykes, 433 U.S. 72, 81 (1977). [See also Fay v. Noia, 372 U.S. 391 (1963)]

This Court has held that where a decision is unclear as to whether it rests on the state or federal constitution, there is no jurisdiction in this Court. The case must be remanded for clarification. Ohio v. Gallagher, 425 U.S. 257, 260 (1976); Dept. of Mental Hygiene of California v. Kirchner, 380 U.S. 194 (1965).

The New York State Constitution (Article I§6) provides protection of the right to an attorney, independent of the United States Constitution (Amendment 6). This protection meets at least those minimal federal constitutional safeguards. The New York State Court of Appeals has provided greater protection of this right explicitly through its interpretation of the New York State Constitution's right to an

attorney provision and not of the federal constitution. People v. Rogers, supra at 171. Clearly then, adequate and independent state grounds exist for the expansion of the right to an attorney in state criminal proceedings under state mandate. Therefore, under the principle of federalism and the past holdings of this Court, the New York State decisions are immune from federal review and the jurisdiction of this Court fails.

A state is, furthermore, entitled to exercise and restrict its own police powers without federal interference so long as it does not deny its citizens the minimal protections of the United State Constitution as interpreted by this Court. [For full argument see Question Two] Since the decisions herein merely enhance the rights of the citizens of the State of New York, there is no jurisdiction in this Court.

QUESTION NUMBER TWO

Do State Courts have the ability to interpret their own state constitutions in a manner so as to give their citizens greater rights than the minimum rights guaranteed under the United States Constitution as interpreted by the Federal Courts?

Petitioner alleges that the guaranty of

a right to an attorney under the United States and New York State Constitutions are couched in "virtually identical" language:

> [i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense. United States Constitution, Amendment VI (in part)
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> . . .[i]n any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions . . . New York State Constitution, Article 1 §6 (in part).

Petitioner therefore contends that the protections afforded under the New York Constitution must be identical to and not greater than - the minimum rights under the United States Constitution. This argument is untenable.

Consideration of the rights guaranteed under the Constitution must first encompass a brief review of the history of these guaranties in our country and the intentions of their drafters. Our constitution was originally drafted and presented with a Bill of Rights. In spite of the arguments by Hamilton, Jay and Madison in The Federalist Papers asserting the needlessness of an explicit listing of rights, adoption of the Constitution was not secured until a Bill of Rights was promised. The popular fear of an over-

whelming central (federal) government necessitated this document. The Fourteenth Amendment was passed in 1868 to insure that the states also honored at least the minimum rights guaranteed by the Federal Constitution and to protect the public from the government. Chambers v. Florida, 309 U.S. 227 (1940); People v. Hobson, 39 N.Y.2d 479 (1976).

Clearly, then, the Federal Bill of Rights was intended at its inception as the guarantor of a minimum standard. People v. Adams, 53 N.Y.2d 239 (1981). It defines a limit below which the federal and, through the Fourteenth Amendment, the state government may not act. In interpreting the Constitution and the Bill of Rights, this Court has adopted this theory by its pronounced concern with federalism considerations. PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980). This Court has held that Federalism allows a variety of solutions to a problem and does not merely attempt to force each state into a solitary mold. Addington v. Texas, 441 U.S. 418 (1979).

The decisions wherein the right to counsel in New York State is expanded are People v.

Rogers, 48 N.Y.2d 167 (1979) and People v. Bartolomeo, 53 N.Y.2d 225 (1981).[2] In Rogers, the New York Court of Appeals[3] explicitly and solely relied upon its interpretation of the New York State Constitution, Article I §6 without refering to the Federal Constitution. Bartolomeo relied on Rogers and is likewise founded on New York law. Both Rogers and Bartolomeo concededly go beyond this Court's interpretation of the Federal Constitution.

States are permitted to give greater rights to its citizens under their state constitutions. This Court has recognized this fact and has determined that it will not unnecessarily interfere in the state's province.[4]

In Patterson v. New York, 432 U.S. 197, 201-202 (1977) when considering the propriety of New York's "affirmative defense" and the burden of proof when such a defense is raised, this Court limited its interference in the expansion of rights under state constitutions when it stated that:

> It goes without saying that preventing and dealing with crime

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2. The decisions of Rogers and Bartolomeo are reproduced herein as Appendices "D" and "E".

3. Herein the New York Court of Appeals will be referred to as "New York".

4. see Jenkins v. Anderson, 447 U.S. 231, 240-241 (1980) where this Court stated that states may give greater evidentiary rights.

> is much more the business of the States than it is of the Federal Government, Irvine v. California, 347 U.S. 128, 134 (1954)(plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,". . . Speiser v. Randall, 357 U.S. 513, 523 (1958); Leland v. Oregon, 343 U.S. 790, 798 (1952); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). [emphasis added]

The Miranda rule evolved solely as a procedural safeguard to protect the accused against compulsory self incrimination. Michigan v. Tucker, 417 U.S. 433, 438-439 (1974); People v. Hawkins, 55 N.Y.2d 474, 483 (1982). The right to an attorney is protected by the Miranda rule and is therefore, by definition, such a procedural safeguard.

New York has long accepted these concepts as well as the theory of Federalism. It is acknowledged by the state courts themselves that they have cherished the rights of their citizens and have thus interpreted their constitution so as to guaranty more rights than

this Court has provided through its interpretation of the Federal Constitution. People v. Adams, supra; People v. Blake, 35 N.Y.2d 331 (1974). New York has, consistent with this Court, held that the Federal Constitution defines only the minimum level of individual rights and leaves the state free to provide greater rights under its state constitution. PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980); Cooper v. Morin, 49 N.Y.2d 69, 79 (1979); People v. Rogers, 48 N.Y.2d 167 (1979); People v. Hobson, 39 N.Y.2d 479, 483-484 (1976).

Petitioner's reliance is misplaced in attempting to use People v. Ponder[5] in support of its position that where the Federal and State constitutions are "virtually identical" then the Federal interpretation must be exactly followed by the state. Ponder concerned automatic standing to challenge a search and seizure. The Court of Appeals noted in its decision that the automatic standing rule was engendered by a decision of this Court. [Jones v. United States, 362 U.S. 257 (1960)]. New

5. People v. Ponder, 54 N.Y.2d 160 (1981)

York explained that due to that holding, it had "felt constrained" to apply the rule. After the later abrogation of that rule by this Court [U.S. v. Salvucci, 448 U.S. 83 (1980)], New York was no longer constrained. In passing, the decision mentioned that the "identity of language supports a policy of uniformity in both State and Federal courts." Ponder, supra at 165. This statement was merely an aside. That court's main concern was the "constraint" it felt due to this Court's elevating the minimum rights under the Constitution thus mandating that New York follow suit. Once this standard was lowered, New York was also free to lower its standards. The decision concerns the raising of the minimum (federal) rights guaranteed which requires that the state meet those rights and not fall below. It in no way limits a state's ability voluntary expansion of rights. In Ponder, New York chose to adopt the minimum (federal) standard. In the instant case, New York chooses to amplify the rights guaranteed to citizens of its states beyond the minimum (federal) standard.

Furthermore, if this proposition were accepted, it could be argued that almost the entire Federal Bill of Rights is reproduced some-

where in the New York State Constitution. Under such a construction the rights guaranteed under the state constitution are superfluous and, therefore, without any meaning of their own.

If the Federal Constitution as interpreted by this Court comprises the sole ruling body of laws concerning the rights of citizens then there would be no need for independent State Bills of Rights. This Court has adopted this aspect of Federalism by restraining its actions prescribing constitutional rules of procedure (Miranda rights are procedural)which would displace or foreclose the development of State rules specifically tailored to local problems and experiences. PruneYard Shopping Center, supra at 81; Patterson v. New York, supra at 201-202; People v. Adams, supra at 250.

New York acted constitutionally and under the accepted theories of Federalism in interpreting the State constitution so as to grant its citizens more than the minimum (federal) rights guaranteed by the Constitution. The Supremacy Clause cannot now be distorted and perverted so as to violate the theories of Federalism, the intent of the drafters of the Bill of Rights and the decades of Federal and state case law.

QUESTION NUMBER THREE

Does the additional protection, provided by the Courts of New York deprive that accused of his Federal Constitutional right to self representation by mandating that waiver of the right to an attorney is permitted, but only in the presence of an attorney?

Petitioner contends that, as New York interprets its constitution, the right to an attorney has deprived the accused of his right to self-representation. This is not the case.

New York has interpreted its constitutional right to an attorney to require the presence of an attorney for an effective waiver of that right where the accused (who is in custody on a criminal matter and police wish to question him on that matter) is presently represented by counsel on a pending non-related criminal matter and the representation is known to the law enforcement authorities. People v. Rogers, 48 N.Y.2d 167 (1979); and People v. Bartolomeo, 53 N.Y.2d 225 (1981). This concededly provides a more expansive right to an attorney under the state constitution than has been held to exist under the Federal Constitution. This is a permissible extention since it insures more rights, not less, than the minimum federal rights. [see argument Question Number Two]

The right to appear pro se is guaranteed by both the United States (Amendment VI) and New York State (Article 1 §6) Constitutions. This right is not violated by recent New York decisions.

The New York decisions appear to support the logical conclusion that if an accused has once (and this being recently) requested the assistance of counsel there is a stronger presumption that he would wish counsel on the second matter. But the decisions do not state this as an all-inclusive proposition. The extension of the right has been limited to the effect that knowledge of present representations will not be imputed to the police. People v. Servidio, 54 N.Y.2d 951 (1981). A duty to inquire is placed on the police only where they have knowledge of a prior arrest and a strong possibility of representation. People v. Smith, 54 N.Y.2d 954 (1981) [police officers testified he "assumed" accused had an attorney]. Therefore any infringement on the right to self representation effects only a very limited number of cases. Even in those situations where Rogers prevents waiver outside the presence of the present attorney, the right to self representation is not

denied.

At most, the only intrusion on the right to self representation, is a slight delay in the waiver and subsequent questioning. Once counsel is present, the accused may exercise the waiver. These provisions are for the protection of the accused. Considering the minimal interference in any possible claim of the right to self representation, the greater rights and protections made available in New York outweighs that interference.

The more expansive right to an attorney provided by interpretation of the New York State Constitution does not deprive the accused of his right to self representation.

QUESTION NUMBER FOUR

Do the rights alluded to under the Ninth and Fourteenth Amendments to the United States Constitution, encompass a "right of the public to be protected from criminals who freely and voluntarily admit to the police the commission of a felony"? If so, does the right of a defendant, under the New York Court of Appeals interpretation of the New York State Constitution violate this right?

The contention that the expansion of the right to an attorney violates a "new" constituted right [i.e. the "right of the public to be protected from criminals who freely and voluntarily

denied.

At most, the only intrusion on the right to self representation, is a slight delay in the waiver and subsequent questioning. Once counsel is present, the accused may exercise the waiver. These provisions are for the protection of the accused. Considering the minimal interference in any possible claim of the right to self representation, the greater rights and protections made available in New York outweighs that interference.

The more expansive right to an attorney provided by interpretation of the New York State Constitution does not deprive the accused of his right to self representation.

QUESTION NUMBER FOUR

Do the rights alluded to under the Ninth and Fourteenth Amendments to the United States Constitution, encompass a "right of the public to be protected from criminals who freely and voluntarily admit to the police the commission of a felony"? If so, does the right of a defendant, under the New York Court of Appeals interpretation of the New York State Constitution violate this right?

The contention that the expansion of the right to an attorney violates a "new" constituted right [i.e. the "right of the public to be protected from criminals who freely and voluntarily

admit to the police the commission of a felony"] is unfounded.

Knowledge of the idealogy of our founding fathers and a review of our constitutional growth manifestly brands such a "right" inconceivable. As stated previously (see Question Number Two) the Bill of Rights was added to our Constitution due to the fears of the populace of an overwhelming central (federal) government. (see The Federalist Papers) They feared a repeat of the tyranny and aggression in England by the majority over the minority. Our rights were enumerated to protect the public from the government Chambers v. Florida, 309 U.S. 227 (1940); People v. Hobson, 39 N.Y.2d 479 (1976). Our Courts, true to these ideals, have consistently guarded against free rule by the majority merely because it is the majority. They have applied balancing tests - to judge whether the interest of the individual or the state is greater in each incident.

Petitioner's claim to a new "right" threatens to negate almost 200 years of protection under the Bill of Rights and to cast aside the ideals and aspirations of our founding fathers. This "right" would place the interests of the majority above

those of the individual and annul the balancing test.

Even if we were to accept the existence of such a right, arguendo, it could not pertain in the instant situation.

The Constitution guarantees that

> [n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . (United States Constitution, Amendment V)

A confession is the most damning evidence in a criminal case. With a confession, a conviction could (but for the protections in our Constitution) be obtained based upon the accused's own utterance. Even with our protections, a confession is extremely persuasive evidence and tends to negate any "reasonable" doubts of the jury.

While it may be accurately contended that the state and "the people" have an interest in the apprehension and conviction of criminals, we cannot so dilute our protections so as to speculate with the rights of all. The greater good is the protection of our individual rights.

Furthermore, the right to an attorney as enhanced in New York does not incapacitate the police in their duties or the state in its prose-

cution. Conviction could not be had on the confession alone in any event. Confessions are not abrogated by the rule but are, rather, strengthened by assuring total conformity with the guaranteed rights through the presence of an attorney or a waiver obtained in the presence of that attorney. This restriction also is only applicable where it can logically said that in good faith the police knew of the present representation by an attorney on an unrelated pending criminal matter.

> The presence of counsel confers no undue advantage to the accused. Rather, the attorney's presence serves to equalize the positions of the accused and sovereign, mitigating the coercive influence of the State and rendering it less overwhelming. People v. Rogers, supra at 173.

There is herein, no overriding "right" of the public which is violated by the right to an attorney as guaranteed in New York under the New York Constitution.

CONCLUSION

The petition for a writ of certiorari should be dismissed or denied.

Respectfully submitted,

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Of Counsel

APPENDIX "A" - Decision on Hearing - See Petition page 1a-30a

APPENDIX "B" - Appellate Division Opinion See Petition page 31a-34a

APPENDIX "C" - New York State Court of Appeals denial - See Petition page 35a

APPENDIX "D" - People v. Rogers, 48 N.Y.2d 167 (1979) - (attached)

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v HERBERT L. ROGERS, Appellant.

Argued September 13, 1979; decided October 23, 1979

SUMMARY

APPEAL, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered May 1, 1978, which affirmed judgments of the Nassau County Court (EDWARD A. BAKER, J.), convicting defendant of robbery in the first degree upon a jury verdict and of burglary in the third degree upon his plea of guilty.

Defendant was arrested as a suspect in a robbery. *Miranda* warnings were administered at the time of arrest and again at police headquarters. Defendant informed the police that he had an attorney but that he was willing to speak in the absence of the attorney. After a two-hour period of interrogation in which defendant denied complicity in the crime, the police received a communication from his attorney instructing them to cease further questioning. Thereafter, the police asked no further questions about the robbery but, under a purported waiver of defendant's rights, continued to question concerning unrelated activities in which he had not participated. These queries continued for approximately four hours after the communication from his attorney. During this entire period, defendant was manacled. After inquiries ceased, the police completed the paper work necessary to process defendant and no further information was sought. Defendant then uttered an inculpatory statement which was overheard by one of the detectives who had been questioning him. His motion to suppress the statement was denied on the ground that the assertion was spontaneously volunteered.

The Court of Appeals reversed the order of the Appellate Division and remitted the case for a new trial, holding, in an opinion by Chief Judge COOKE, that once an attorney has entered the proceeding, thereby signifying that the police should cease questioning, a defendant in custody may not be further interrogated in the absence of counsel, and that the inculpatory statement was not spontaneously volunteered.

People v Rogers, 63 AD2d 867, reversed.

HEADNOTES

Crimes — Confession — Custodial Interrogation

1. Once an attorney has entered a proceeding, thereby signifying that the police should cease questioning, a defendant in custody may not be further interrogated in the absence of counsel, and the police may not seek a waiver of the right to counsel except in the presence of counsel; accordingly, an inculpatory statement made by a defendant in custody after the police had received a communication from defendant's attorney instructing them to cease further questioning and after they continued to question the defendant concerning unrelated activities in which he had not participated, was improperly admitted at defendant's trial, and a new trial is required. The inculpatory statement was not admissible as a spontaneously volunteered statement, in view of the approximately six hours of interrogation during which time the defendant, a youth of limited education, was manacled to furniture.

Crimes — Instructions

2. It is unnecessary and improper to qualify a charge to the jury that no inferences are to be drawn from a defendant's failure to testify with words indicating that it is given at defendant's request.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES*

CLS, Criminal Procedure Law § 60.45
29 Am Jur 2d, Evidence § 587
5 Am Jur Trials 461, Excluding Illegally Obtained Evidence

ANNOTATION REFERENCES

Constitutional aspects of procedure for determining voluntariness of pretrial confession. 1 ALR3d 1251.

Admissibility of pretrial confession in criminal case. 12 L Ed 2d 1340.

* By the Publisher's Editorial Staff.

POINTS OF COUNSEL

Michael J. Obus, Matthew Muraskin and *Barbara M. Rosen* for appellant. I. Appellant's statement should have been suppressed since it was the product of unlawful interrogation. (*People v Hobson*, 39 NY2d 479; *People v Arthur*, 22 NY2d 325; *People v Vella*, 21 NY2d 249; *People v Donovan*, 13 NY2d 148; *People v Kaye*, 25 NY2d 139; *People v McKie*, 25 NY2d 19; *People v Paulin*, 25 NY2d 445; *People v Jackson*, 41 NY2d 146; *People v Stroud*, 63 AD2d 721; *People v Stewart*, 41 NY2d 65.) II. It was error to inform the jury that the charge

regarding appellant's decision not to testify had been requested by appellant. *(People v McLucas,* 15 NY2d 167; *People v Britt,* 43 NY2d 111.) III. If appellant's robbery conviction is reversed, his plea of guilty to burglary in the third degree should be vacated. *(People v Clark,* 45 NY2d 432; *People v Selikoff,* 35 NY2d 227; *People v Lowrance,* 41 NY2d 303; *People v Jones,* 57 AD2d 905; *People v Campana,* 40 AD2d 833, 33 NY2d 538.)

Denis Dillon, District Attorney (Judith K. Sternberg and *William C. Donnino* of counsel), for respondent. I. Defendant's statement was spontaneous; it was not the product of improper police interrogation; therefore, it was correctly admitted into evidence at his trial for robbery. *(People v Hetherington,* 27 NY2d 242; *People v Taylor,* 27 NY2d 327; *People v Carl,* 46 NY2d 806; *People v Maerling,* 46 NY2d 289; *People v Clark,* 41 NY2d 612; *Massaiah v United States,* 377 US 201; *United States v Garcia,* 377 F2d 321; *People v Ramos,* 40 NY2d 610; *People v Townes,* 41 NY2d 97.) II. The court's charge, to which no exception was taken, did not constitute reversible error. *(People v Turner,* 48 AD2d 674; *People v Carlton,* 48 AD2d 775; *People v Patterson,* 39 NY2d 288; *People v McLucas,* 15 NY2d 167; *People v Britt,* 43 NY2d 111.) III. If appellant's conviction of robbery is vacated, his plea of guilty to burglary in the third degree must be vacated. *(People v Clark,* 45 NY2d 432.)

OPINION OF THE COURT

Chief Judge Cooke.

[1] We hold today that once an attorney has entered the proceeding, thereby signifying that the police should cease questioning, a defendant in custody may not be further interrogated in the absence of counsel. We may not blithely override the importance of the attorney's entry by permitting interrogation of an accused with respect to matters which some may perceive to be unrelated.

Defendant was convicted, after jury trial, of robbery in the first degree and, upon plea of guilty, of burglary in the third degree. The evidence at trial in part consisted of eyewitness testimony and certain statements made by defendant while in custody and after his attorney had instructed police to cease further questioning. Defendant unsuccessfully sought to suppress this proof and the judgments of conviction were affirmed

by the Appellate Division, without opinion. There should be a reversal and a new trial on the robbery indictment.

Defendant was arrested in his home on December 16, 1975 at about 10:15 A.M. as a suspect in a liquor store robbery committed by two youths on February 7, 1975. Defendant was handcuffed, placed in a patrol car and taken to the robbery squad in Mineola. At the time of arrest, and again at police headquarters, *Miranda* warnings were administered. Defendant informed the police that he had an attorney but that he was willing to speak in the absence of the attorney. After a two-hour period of interrogation in which defendant denied complicity in the crime, the police received a communication from his attorney instructing them to cease further questioning.

Thereafter, the police asked no further questions about the robbery but, under a purported waiver of defendant's rights, continued to question concerning unrelated activities in which he had not participated. These queries continued for approximately four hours after the communication from his attorney. During this entire period, defendant was manacled. After inquiries ceased, the police completed the paper work necessary to process defendant and no further information was sought. Defendant then uttered an inculpatory statement which was overheard by one of the detectives who had been questioning him. His motion to suppress the statement was denied on the ground that the assertion was spontaneously volunteered, and this appeal is based on that ruling.[1]

The genesis of defendant's utterance must be determined to be either as one arising out of sheer spontaneity or as having been induced by illegal police questioning. The threshold issue is whether once a defendant is represented on pending matters, the police may question the defendant on items unrelated to the subject of that representation after the defendant, in the absence of counsel, has waived his rights.

This court has jealously guarded the individual's privilege against self incrimination and right to counsel, demanding that these fundamental rights be accorded the highest degree of respect by those representing the State. Indeed, it has been announced in broad language that "[o]nce an attorney enters

1. Defendant does not challenge on this appeal the refusal to suppress identification testimony or the statements made by defendant prior to the call to the police by defendant's attorney.

the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney, of the defendant's right to counsel * * * There is no requirement that the attorney or the defendant request the police to respect this right of the defendant" (*People v Arthur*, 22 NY2d 325, 329; see, also, *People v Settles*, 46 NY2d 154; *People v Hobson*, 39 NY2d 479).

The People maintain nonetheless that a waiver in the presence of counsel is necessary only when the defendant is subjected to interrogation concerning the charge on which he is represented. Thus, it is urged that the four-hour interrogation after the attorney had entered the proceeding was proper because it dealt only with unrelated matters. The People's position, however, is untenable, it being at odds with the thrust of recent decisions concerning the scope of the State constitutional right to counsel (NY Const, art I, § 6).

It is true that previous decisions of this court, rendered in an era when the *Arthur* rule was in doubt, excepted from its scope questioning about a charge unrelated to the one on which defendant was represented (see *People v Taylor*, 27 NY2d 327; *People v Hetherington*, 27 NY2d 242; but see *People v Vella*, 21 NY2d 249). And, when the *Arthur* rule was revitalized in *People v Hobson* (39 NY2d 479, 483, *supra*), the exception for unrelated charges was again articulated, although there the court had no need to apply the rule. Since *Hobson*, however, it has been difficult to define the precise reach of the limitation concerning unrelated charges. Perhaps this is a result of the obvious difficulty encountered in drawing the subtle distinctions necessitated by the interaction of the *Hobson* and *Taylor* rules.

Specifically, in *People v Ramos* (40 NY2d 610), where the defendant, who was represented by an attorney on a drug charge, had been advised not to make any statements at the time of his arrest on an unrelated charge, the advice of the attorney was deemed sufficient to trigger the *Arthur* rule, and the statements concerning the unrelated charge were suppressed. The ruling was based not on "the mere fortuity that [defendant] was represented by counsel on an unrelated charge, but rather * * * on the attorney's affirmative and direct action relative to the interrogation which was about to be commenced" (*Ramos*, 40 NY2d, at p 617). The broad *Taylor* rule was refined and limited to include the situation "where

counsel had not entered the proceeding and where no request for counsel had been made, even though the same defendant might, by mere happenstance, be represented by counsel in a totally unrelated proceeding" *(id.)*.

Last term in *People v Carl* (46 NY2d 806, 807), it was held to be a "technicality of little significance" that defendant was questioned concerning a crime different than the one for which he was in custody. Prior to the interrogation, counsel had instructed the Sheriff not to speak with defendant in the absence of counsel. Notwithstanding that separate crimes were involved, the court determined that the charges were sufficiently related to preclude interrogation in the absence of counsel because the two incidents occurred within approximately one week, both involved burglaries or attempted burglaries at the same location and both were charged in the same indictment.

The *Taylor* limitation was further refined in *People v Ermo* (47 NY2d 863), where defendant was questioned about both an assault and a homicide, committed seven months apart, in the absence of the attorney who represented him on the assault charge. Although conceding that the police would have been entitled to question defendant on the homicide alone, the court nonetheless held statements concerning the homicide to be inadmissible because "the police exploited concededly impermissible questioning as to the assault for the purpose and with the effect of advancing their interrogation on the homicide charge" *(id.,* at p 865). By suppressing these statements, however, the question no longer was whether the defendant was represented on the charge about which he was questioned. Rather, the focus of inquiry was the circumstances of the interrogation and whether its subject included a charge on which defendant had an attorney (see 47 NY2d, at p 868, GABRIELLI, J., dissenting).

Thus following *Hobson* it has been urged in several cases and under a variety of circumstances that the exception concerning unrelated charges was applicable. In each instance, however, it has been found that the exception could not be applied or expanded consistent with the *Hobson* rationale. It is evident that in these cases, the *Taylor* rule was considerably narrowed (but cf. *People v Coleman*, 43 NY2d 222; *People v Clark*, 41 NY2d 612). The common thread running through these holdings is the simple fact that defendant was represented by an attorney at the time of the

interrogation. We today recognize that the *Taylor* rule is inconsistent with the principles enunciated in *Hobson* and declare that once a defendant is represented by an attorney, the police may not elicit from him any statements, except those necessary for processing or his physical needs. Nor may they seek a waiver of this right, except in the presence of counsel.

Our acknowledgment of an accused's right to the presence of counsel, even when the interrogation concerns unrelated matters, represents no great quantitative change in the protection we have extended to the individual as a shield against the awesome and sometimes coercive force of the State. An attorney is charged with protecting the rights of his client and it would be to ignore reality to deny the role of counsel when the particular episode of questioning does not concern the pending charge. It cannot be assumed that an attorney would abandon his client merely because the police represent that they seek to question on a matter unrelated to the charge on which the attorney has been retained or assigned. Finally, it is the role of defendant's attorney, not the State, to determine whether a particular matter will or will not touch upon the extant charge. Once a defendant has an attorney as advocate of his rights, the attorney's function cannot be negated by the simple expedient of questioning in his absence.

The presence of counsel confers no undue advantage to the accused. Rather, the attorney's presence serves to equalize the positions of the accused and sovereign, mitigating the coercive influence of the State and rendering it less overwhelming. That the rule diminishes the likelihood of a waiver or self incriminating statements is immaterial to our system of justice (see *People v Settles*, 46 NY2d 154, 164, *supra*; *People v Donovan*, 13 NY2d 148, 152). Although the State has a significant interest in investigating and prosecuting criminal conduct, that interest cannot override the fundamental right to an attorney guaranteed by our State Constitution.[2] Available are means other than subjecting a person represented by an attorney to interrogation in the absence of counsel.

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2. Contrary to the suggestion of the dissent, this holding creates no undue impediment to the investigation of criminal conduct unrelated to the pending charge. An accused represented by counsel may still be questioned about such matters; we hold simply that information obtained through that questioning in the absence of counsel may not be used against him. Thus, the police may continue to obtain information from a defendant who is a mere witness to unrelated events.

Having determined that the police interrogation was improper, we turn then to the question whether the inculpatory statement was admissible as a "spontaneously volunteered statement" (*People v Hobson*, 39 NY2d, at p 483, *supra*). To fit within this narrow exception, the "spontaneity has to be genuine and not the result of inducement, provocation, encouragement or acquiescence, no matter how subtly employed" (*People v Maerling*, 46 NY2d 289, 302-303). Given the unique circumstances here, there can be no conclusion other than that defendant's statement did not fall within the exception. Defendant, a youth of limited education, was vigorously questioned by two experienced detectives. Although no physical force was employed, the interrogation covered an extensive period—approximately six hours—and during this entire time defendant was manacled to furniture. A coercive atmosphere had been affirmatively created by the continuous interrogation and the significant restriction on defendant's freedom of movement. The statement was made in the interrogation room when defendant was still handcuffed and while the police processed the paper work in his presence. It cannot be doubted that the psychologically coercive influence of the police tactics had its effect on defendant and induced the statement apparently directed to himself (compare *People v McKie*, 25 NY2d 19, and *People v Kaye*, 25 NY2d 139, with *People v Garofolo*, 46 NY2d 592, and *People v Maerling*, 46 NY2d 289, *supra*).

Mere custody exerts some coercive influence on a suspect, but generally, such influence alone will not form the predicate for finding a statement nonspontaneous as a matter of law. Nor is a statement to be precluded simply because it followed a period of questioning conducted at some prior time. Here there is much more; defendant's will was overborne by a course of conduct destructive of dignity with no respite save for a mere half hour.

[1, 2] The introduction of defendant's inculpatory statement was error, which cannot be termed "harmless beyond a reasonable doubt" (*People v Crimmins*, 36 NY2d 230, 237), and requires a new trial.[3] Since defendant's plea of guilty to

3. [2] Defendant raises as another point on this appeal that the trial court erred when it informed the jury that the defendant had requested the charge that no inferences were to be drawn from the defendant's failure to testify. Defendant failed to object to the charge and thereby failed to preserve this issue for review. In any event, in light of the disposition of this case, it is unnecessary to rule on this issue.

(a cont'd)

burglary in satisfaction of another indictment was entered upon an agreement that the sentence imposed would run concurrently with the sentence imposed on the robbery conviction, the plea should be vacated *(People v Clark,* 45 NY2d 432).

The order of the Appellate Division should be reversed, judgments and plea of guilty vacated, statement suppressed and case remitted to Nassau County Court for a new trial on the robbery indictment and further proceedings on the burglary indictment in accordance with this opinion.

JASEN, J. (dissenting). I simply cannot accept the theory, espoused by the majority of this court, that a defendant represented by counsel in a pending criminal proceeding may not be questioned by law enforcement officers even about concededly unrelated matters in the absence of that counsel. To reach such a result, the majority not only misperceives the right of an accused to be represented by counsel, but, also, blindly elevates that right above the compelling interest of the State to investigate and prosecute criminal conduct.

It has long been recognized in this State that law enforcement officers may question a defendant about matters which are unrelated to the criminal proceeding in which the defendant is represented by counsel. *(People v Ermo,* 47 NY2d 863, 865; *People v Coleman,* 43 NY2d 222, 226-227; *People v Clark,* 41 NY2d 612, 615, cert den 434 US 964; *People v Hobson,* 39 NY2d 479, 483; *People v Taylor,* 27 NY2d 327, 331-332; *People v Hetherington,* 27 NY2d 242, 245.) Contrary to the majority's assertion, this rational rule of law is hardly inconsistent with the principle that "[o]nce an attorney enters the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney, of the defendant's right to counsel" *(People v Arthur,* 22 NY2d 325, 329; *People v Hobson,* 39 NY2d 479, 483, *supra).* That no inconsistencies were ever perceived or, indeed, anticipated by this court from the application of these two distinct concepts is apparent from the plain language of *Hobson* itself, where this court, in unanimously reaffirming the rule of the *Arthur* case *(supra)* observed: "[T]he fact that a defendant is represented by counsel in a proceeding unrelated

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Because a new trial is warranted, however, we note that it is unnecessary and improper to qualify the charge with words indicating that it is given at defendant's request (see *People v McLucas,* 15 NY2d 167).

to the charges under investigation is not sufficient to invoke the *[Arthur]* rule (see *People v Hetherington*, 27 NY2d 242, 245, *supra; People v Taylor*, 27 NY2d 327, 331-332)." *(People v Hobson*, 39 NY2d, at p 483, *supra.)* Thus, the majority's assertion that these rules of law are inconsistent is belied by the unequivocal language of the very case from which they attempt to draw support.

Nor does the rule of law which authorizes the questioning of a defendant as to matters unrelated to the proceeding in which he is represented by an attorney impinge upon the right of an accused to be assisted by counsel. With respect to these unrelated matters, there has yet to be any formal commencement of a criminal proceeding against the defendant to which the right to counsel would attach. *(People v Simons*, 22 NY2d 533, 539; *People v Stanley*, 15 NY2d 30, 32-33.) Further, the defendant, after being informed of his constitutional rights, could simply refuse to respond to inquiries posed to him by the law enforcement officers or request that an attorney be provided for him during questioning. A defendant is under no compulsion to answer any questions whatsoever, even as to unrelated matters. Thus, as in this case, where a defendant voluntarily chooses to provide the police with information concerning criminal activitiy which differs from the criminal conduct which gave rise to his arrest and there is absolutely no indication of exploitation of defendant by law enforcement officers, a defendant's right to counsel is simply not jeopardized.

In my opinion, implementation of the majority's holding—purportedly predicated on right to counsel principles—will serve only to impede effective law enforcement by depriving police officers of valuable sources of information. For example, pursuant to the majority's position, law enforcement officers will be precluded from questioning a defendant charged with driving a motor vehicle while intoxicated about a brutal murder unless they first contact the defendant's attorney representing him on the driving while intoxicated charge and secure his presence at the questioning. This is so even if the defendant was an innocent bystander who witnessed the murder and voluntarily agreed to co-operate with the police. Surely, the right to counsel was never intended to prevent a defendant from voluntarily co-operating with police concerning matters unrelated to the crime for which he is

charged. To hold to the contrary defies both constitutional principles and common sense.

Even accepting, *arguendo*, the view of the majority that defendant was improperly questioned as to unrelated crimes, there exists an additional, and, indeed, fatal flaw in the rationale adopted by the majority. I had thought it was a well-established principle of law in this State that a spontaneous statement made to police by a defendant who had been advised of his constitutional rights is not rendered inadmissible solely because the defendant was in custody and represented by counsel who was not present when the statement was volunteered. (*People v Clark*, 41 NY2d 612, 615, *supra*; *People v Hobson*, 39 NY2d 479, 483, *supra*; *People v Kaye*, 25 NY2d 139, 143-144; *Matter of Carlton W.*, 63 AD2d 830; *People v Howard*, 62 AD2d 179, 181; *People v Talamo*, 55 AD2d 506, 507-508.)

Yet, today, the majority holds that the concededly volunteered statement of this convicted defendant was not spontaneous, and, therefore, must be suppressed. Such conclusion is reached by the majority only after reviewing the facts in the record and drawing inferences therefrom. This, we are unable to do. (NY Const, art VI, § 3.)

The issue of whether an inculpatory statement is "spontaneous" and, thus, admissible into evidence despite law enforcement officers' failure to honor a defendant's right to counsel is essentially one of fact. (*People v Maerling*, 46 NY2d 289, 301.) Here, County Court, after considering all the facts and circumstances present, determined that defendant's inculpatory statement was spontaneous. This finding of spontaneity, being affirmed by the Appellate Division, is beyond our review if there exists any factual support in the record for such determination. (*Id.*; cf. *People v Leonti*, 18 NY2d 384, 390.) Stated differently, the sole question before this court is whether, under any view of the facts, it could be concluded that defendant's statement was not solicited by law enforcement officers.

The testimony adduced at the suppression hearing reveals that defendant was not physically abused or threatened by the police officers. Defendant was questioned only as to matters concerning unrelated crimes after 1:00 P.M. and, further, all questioning of defendant occurred during the daytime and ceased by 4:45 P.M. It was not until a half hour later when defendant, while gazing out the window, uttered the inculpa-

tory statement. The police officers were not conversing with defendant at this time, as they were completing their paper work with respect to defendant's arrest.

Given these circumstances, I find more than ample evidence to support County Court's determination that defendant's statement was spontaneous. In my opinion, the majority, in holding to the contrary, has transgressed our limited scope of review in these matters and has, in actuality, usurped the authority of County Court and the Appellate Division to pass upon issues of fact. Where reasonable minds may differ as to the inferences to be drawn from a certain set of circumstances, this court "may not interfere with the affirmed findings of that court possessing authority to resolve the issues of fact." *(People v Wharton,* 46 NY2d 924, 925.)

Further, as we noted in *People v Kaye* (25 NY2d 139, 145, *supra),* "[t]ruly voluntary confessions constitute a highly trustworthy type of evidence * * * No court has yet held that a police officer must take affirmative steps, by gag or otherwise, to prevent a talkative person in custody from making an incriminatory statement within his hearing. * * * To require a police officer to prevent a prisoner from volunteering a statement, or to prevent the officer from divulging statements spontaneously made to him would stretch the comprehension of the average citizen to the breaking point. Our decisions must appear to be rational, fair as well as practical, if the courts are to retain the respect of the people. The admonition of Justice CARDOZO is particularly appropriate under these circumstances—'[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament.' *(Snyder v. Massachusetts,* 291 U. S. 97, 122.)"

Accordingly, I would affirm the order of the Appellate Division.

Judges JONES, WACHTLER, FUCHSBERG and MEYER concur with Chief Judge COOKE; Judge JASEN dissents and votes to affirm in a separate opinion in which Judge GABRIELLI concurs.

Order reversed, judgments and plea of guilty vacated, statement suppressed and case remitted to Nassau County Court for further proceedings on the indictments in accordance with the opinion herein.

APPENDIX "E" - People v. Bartolomeo, 53 N.Y.2d 225 (1981) - (attached)

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v PETER BARTOLOMEO, Appellant.

Argued April 27, 1981; decided June 16, 1981

SUMMARY

APPEAL, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered July 21, 1980, as amended by an order entered August 5, 1980, which affirmed a judgment of the Supreme Court (THOMAS M. STARK, J.), rendered in Suffolk County upon a verdict convicting defendant of murder in the second degree.

On May 27, 1978, defendant was arrested by the Suffolk County Police Department and arraigned on a charge of arson. At that arraignment defendant was represented by counsel. Thereafter, on June 5, 1978, defendant was apprehended by officers of the same law enforcement agency and taken to its homicide headquarters in connection with an unrelated homicide. At no time did defendant or his father, who was with him when he was taken into custody, refer to the fact that he had an attorney on the arson charge. At the police station two homicide squad detectives, both of whom knew of defendant's arson arrest a few days earlier, but neither of whom knew that he was represented by counsel in that matter, advised defendant of his constitutional preinterrogation rights. Defendant stated that he did not want an attorney and would answer questions without one. Defendant was then informed that he was under arrest for the homicide. Thereafter, the officers elicited the incriminating statements from defendant that he later sought to suppress on the ground that his constitutional right to counsel had been violated. Following a hearing, suppression was denied. The Appellate Division affirmed, without opinion.

The Court of Appeals reversed, vacated the judgment of conviction, suppressed the statements made to the police officers and remitted the case to the Supreme Court for further proceedings on the indictment, holding, in an opinion by Judge JONES, that a suspect cannot waive counsel

in the absence of counsel where the interrogating officers know he had been arrested only days before on an unrelated charge and, although they do not have actual knowledge of his representation on said charge, he did, in fact, have counsel thereon; that evidence seized pursuant to a search warrant issued on the basis of a sworn statement by defendant's accomplice as to events which provide probable cause for the issuance of the warrant need not be suppressed; that the police officer's affidavit, submitted to obtain the search warrant, characterizing the information received from the accomplice as "reliable" does not invalidate the warrant by reason of the detective's subsequent expression of doubt as to the accomplice's truthfulness on matters not addressed in the warrant application, and that the rule that a defendant may not be convicted on the testimony of an accomplice unsupported by corroborative evidence does not apply to the establishment of probable cause for the issuance of a search warrant.

People v Bartolomeo, 77 AD2d 819, reversed.

HEADNOTES

Crimes — Right to Counsel — Representation on Unrelated Matter

1. Statements obtained in consequence of a police interrogation of a suspect must be suppressed if, in fact, the suspect is represented by an attorney on an unrelated charge, for which he had been arrested by the same law enforcement agency nine days previously, and such prior arrest is known to the interrogating officer, even though the fact of the suspect's legal representation on the matter is unknown to the interrogating officer; such actual knowledge of the recent arrest charges the officers with constructive notice of counsel, if an attorney was obtained, and forecloses the officers either from questioning defendant or accepting his waiver of counsel's assistance unless his attorney is present.

Crimes — Search Warrant — Probable Cause

2. The two-prong test set out in *Aguilar v Texas* (378 US 108) which must be met when a warrant is sought on the basis of a law enforcement officer's affidavit reciting information relayed to him by another person, i.e., that the source from which a police officer obtained his knowledge was reliable and that the information obtained from that source was itself entitled to be credited, is inapplicable when there is presented to the issuing Magistrate a sworn statement of the factual information sufficient to establish probable cause for the warrant's issuance made by one, such as an accomplice, to whom the data is firsthand information by reason of his personal observation and participation in the events described and, accordingly, evidence seized pursuant to a warrant issued on the basis of such information need not be suppressed.

Crimes — Search Warrant — Probable Cause

3. If a defendant establishes that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in a search warrant affidavit and that such false statement is necessary to the finding of probable cause, the search warrant must be voided. However, a warrant is not invalid where the police officer affiant expressed doubt as to defendant's accomplice's truthfulness concerning matters which had no relation to the abbreviated information obtained from the accomplice that was set out in the detective's affidavit, which described him as "reliable"; additionally, even if the detective's affidavit were to be disregarded in its entirety, the detailed, sworn statement of the accomplice, based on his knowledge of and participation in the event charged and submitted with the officer's affidavit, is alone sufficient to provide probable cause for the issuance of the warrant.

Crimes — Search Warrant — Probable Cause

4. The rule that a defendant may not be convicted on the testimony of an accomplice unsupported by corroborative evidence (CPL 60.22) does not apply to the establishment of probable cause for the issuance of a search warrant; the statute prescribing the rule is expressly applicable only to convictions and, moreover, the significant difference in kind between the determination of guilt beyond a reasonable doubt as the predicate for the imposition of criminal sanctions, on the one hand, and the demonstration of probable cause sufficient to satisfy the constitutional requirements for search and seizure as the warrant for police investigation, on the other, justifies a differentiation.

POINTS OF COUNSEL

Richard A. Greenberg for appellant. I. Appellant's uncounseled station house interrogation by Detective Rafferty nine days after appellant's right to counsel h[illegible] attached on pending felony charges in the same county violated his right to counsel under the authority of *People v Rogers* (48 NY2d 167) and the Sixth and Fourteenth Amendments to the United States Constitution. (*People v Wander*, 47 NY2d 724; *People v Garofolo*, 46 NY2d 592; *People v Maerling*, 46 NY2d 289; *People v Pinzon*, 44 NY2d 458; *People v Macedonio*, 42 NY2d 944; *People v Hobson*, 39 NY2d 479; *People v Vella*, 21 NY2d 249; *People v Miller*, 76 AD2d 576; *People v Settles*, 46 NY2d 154; *People v Ramos*, 40 NY2d 610.) II. The prosecutor's knowing and uncorrected use at trial of his witness' perjured testimony concerning the existence of a promise on a pending charge violated due process and appellant's right to a fair trial guaranteed by the New York and United States Constitutions. (*Du Bose v LeFevre*, 619 F2d 973; *People v Savrides*, 1 NY2d 554; *Giglio v United States*, 405 US 150; *Napue v Illinois*, 360 US 264; *Taylor v Lombard*, 606 F2d 371.)

III. The prosecutor's introduction of evidence at trial, over objection, that others had attempted to suppress evidence or otherwise obstruct justice, without any showing that appellant knew of and authorized such conduct, deprived appellant of his due process right to a fair trial in violation of the New York and United States Constitutions. *(People v Shilitano*, 218 NY 161; *People v Pignataro*, 263 NY 229; *People v Plummer*, 36 NY2d 161; *People v Buzzi*, 238 NY 390.) IV. Appellant's right of confrontation guaranteed by New York's Civil Rights Law and the Sixth and Fourteenth Amendments to the United States Constitution, as well as his due process right to a fair trial guaranteed by the New York Constitution and the Fourteenth Amendment, were violated when the prosecution's principal witness was permitted to invoke repeatedly his Fifth Amendment privilege on cross-examination without his direct testimony being stricken upon appellant's timely motion. *(People v Schneider*, 44 AD2d 845, 36 NY2d 708; *Pointer v Texas*, 380 US 400; *United States v Cardillo*, 316 F2d 606, 375 US 822; *People v Kelly*, 48 AD2d 802; *People v Baker*, 39 NY2d 923, 429 US 868; *People v Daniels*, 37 NY2d 624.) V. The probable cause and due process standards of the New York Constitution and the Fourth and Fourteenth Amendments to the United States Constitution were violated by the issuance of a search warrant upon the hearsay confession of an alleged accomplice whose reliability (a) was not corroborated by any facts and (b) was known to be questionable by the submitting officer who nonetheless falsely swore otherwise in his own accompanying affidavit. *(People v Elwell*, 50 NY2d 231; *People v Hanlon*, 36 NY2d 549; *Aguilar v Texas*, 378 US 108; *Spinelli v United States*, 393 US 410; *People v Wheatman*, 29 NY2d 337; *People v Sawicki*, 60 AD2d 739; *People v Everett*, 60 AD2d 693; *People v Wolzer*, 41 AD2d 679; *People v Johns*, 41 AD2d 342; *United States v Harris*, 403 US 573.)

Patrick Henry, District Attorney (Vincent A. Malito of counsel), for respondent. I. Appellant's admissions to the police were not obtained in violation of his right to counsel. *(People v Rogers*, 48 NY2d 167; *People v Coleman*, 43 NY2d 222; *People v Garofolo*, 46 NY2d 592; *People v*

Marrero, 51 NY2d 56; *People v Lynes*, 49 NY2d 286; *People v Miller*, 76 AD2d 576; *People v Samuels*, 49 NY2d 218; *People v Benitez*, 76 AD2d 196; *People v Brathwaite*, 76 AD2d 931; *People v Bacote*, 76 AD2d 866; *People v Whitaker*, 75 AD2d 111; *People v Bolden*, 75 AD2d 622; *People v Couch*, 74 AD2d 582.) II. The witness Giordano testified truthfully at all times, and the prosecutor did not permit perjured testimony. III. Appellant was not deprived of a fair trial by the evidence of threats and intimidation. IV. Caprisecca's invocation of his Fifth Amendment privilege on cross-examination and the court's refusal to strike his direct testimony were appropriate. (*United States v Cardillo*, 316 F2d 606, 375 US 822; *Dunbar v Harris*, 612 F2d 690; *People v Baker*, 48 AD2d 662; *People v Brown*, 40 NY2d 381; *People v Schneider*, 44 AD2d 845, 36 NY2d 708; *People v Jackson*, 94 Misc 2d 33, 102 Misc 2d 443.) V. The application for the search warrant authorizing the seizure of defendant's Volkswagen was sufficient. (*People v Everett*, 60 AD2d 693; *People v Sawicki*, 60 AD2d 739; *People v Johns*, 41 AD2d 342.)

OPINION OF THE COURT

JONES, J.

[1, 2] Where to the knowledge of the interrogating officer a suspect being questioned had been arrested by the same law enforcement agency nine days previously on an unrelated charge, statements obtained in consequence of the interrogation must be suppressed if in fact the suspect is represented by an attorney with respect to the unrelated charge even though the fact of such representation is unknown to the officer. In such circumstances defendant cannot effectively waive his right to counsel unless the attorney is present.[1] There need not be suppression, however, of evidence seized pursuant to a search warrant issued on the basis of a sworn statement by one who has personal knowledge of, and participated in, events which provide probable cause for the issuance of the warrant.

1. We intimate no views as to what might be the consequence in another case in which the defendant's prior arrest is remote in time or place or is made by officers of another law enforcement agency (cf. *People v Kazmarick*, 52 NY2d 322, 328, 329).

[1] On this appeal from an order affirming a judgment convicting defendant of the crime of murder in the second degree after a jury trial defendant contends that numerous errors before and during trial, require reversal of his conviction. Because error was committed in the denial of his pretrial motion to suppress incriminating statements obtained from him while in custody in the absence of, and in violation of his right to, counsel, we reverse and remit for further proceedings without consideration of other alleged trial errors.

Findings of fact made by the Judge who presided at the suppression hearing, which have been affirmed by the Appellate Division, establish the following sequence of events. On May 27, 1978 defendant was arrested by the Suffolk County Police Department and arraigned on a charge of arson. At that arraignment defendant was represented by counsel, attorney Joseph Stabile.

Thereafter, on June 5, 1978, defendant was apprehended by officers of the same law enforcement agency and taken to its homicide headquarters in connection with an investigation then being conducted of the death of one John McLaughlin which had occurred the preceding April. At no time did defendant or his father, who was with him when he was taken into custody, refer to the fact that he had an attorney on the arson charge.

At the police station two homicide squad detectives, Rafferty and Donohue, both of whom knew of defendant's arson arrest a few days earlier but neither of whom knew that he was represented by counsel in that matter, advised defendant of his constitutional preinterrogation rights. In response to questions from the detectives and without mention of the fact that he already had an attorney on the arson charge, defendant stated that he did not want an attorney and would answer the detectives' questions without one. Detective Rafferty then informed him that he was under arrest for the McLaughlin homicide and, by relating details of a statement implicating defendant given by an accomplice Caprisecca (who was already in custody in connection with the crime), extracted from defendant the incriminating statements sought to be suppressed. Approximately

three-quarters of an hour after defendant's arrival at the police station, an attorney, who had been consulted by attorney Stabile concerning the arson charge, called the station and informed Detective Rafferty that he was representing defendant and wanted all questioning to cease. Thereupon the interrogation promptly came to an end.

In denying suppression of Detective Rafferty's and Detective Donohue's testimony as to the statements made to them by defendant while he was in custody on June 5, the Judge presiding at the suppression hearing concluded that there had been no violation of the defendants constitutional right of access to counsel at the time he waived his right to counsel, no attorney having entered the homicide proceeding at that time. "The defendant's happenstance representation by an attorney in the unrelated arson proceedings, such fact being unknown to the homicide squad detectives, is insufficient to invoke the Hobson rule."[2] The Appellate Division affirmed, without opinion.

We reach a different conclusion and accordingly reverse the judgment of conviction. Knowledge that one in custody is represented by counsel, albeit on a separate, unrelated charge, precludes interrogation in the absence of counsel and renders ineffective any purported waiver of the assistance of counsel when such waiver occurs out of the presence of the attorney *(People v Miller*, 54 NY2d 616; *People v Rogers*, 48 NY2d 167). The same consequence flows from knowledge, such as that possessed by Detectives Rafferty and Donohue here, that the defendant has been arrested only seven days earlier by members of the same police department on an arson charge, if in fact the defendant has counsel on the earlier charge. This follows naturally on the awareness on the part of law enforcement personnel of judicial concern for, and protection of, a criminal defendant's right to the aid of counsel at every critical stage of proceedings against him. Hence, the interrogating detectives here, with actual knowledge of the

2. The rule referred to was stated in *People v Hobson* (39 NY2d 479) at page 481: "Once a lawyer has entered a criminal proceeding representing a defendant in connection with criminal charges under investigation, the defendant in custody may not waive his right to counsel in the absence of the lawyer."

outstanding arson charge against defendant, were under an obligation to inquire whether defendant was represented by an attorney on that charge. Having failed to make such inquiry, the officers were chargeable with what such an inquiry would have disclosed—namely, that defendant did have an attorney acting on his behalf. With such knowledge they were foreclosed either from questioning defendant or from accepting his waiver of counsel's assistance unless his attorney was then present. It was therefore error to deny suppression of testimony as to the statements made by defendant at the Suffolk County police station on June 5, 1978. For this reason, defendant's conviction must be vacated.

[2] We reject however defendant's contention that it was error to deny suppression of his 1966 Volkswagen which had been seized pursuant to a search warrant issued by Suffolk County Court. (At the trial photographs of the vehicle taken by the police after its seizure were received in evidence, as was testimony by a resident of the neighborhood in which the homicide occurred, who had been shown the Volkswagen by the police, that it looked like a vehicle that he had seen there on the night of the homicide.)[1]

The warrant which directed seizure of the vehicle, reciting that probable cause had been shown that the Volkswagen constituted evidence of a crime and tended to show that a particular person had committed a crime, was issued on presentation to a Suffolk County Court Judge of a sworn, written statement given by the accomplice Caprisecca which accompanied an affidavit by Detective Rafferty. The first of these documents contained a detailed eyewitness recital of events surrounding the McLaughlin homicide, including a description of Caprisecca's and defendant's midnight journey in defendant's Volkswagen to the place of residence of the victim armed with a gun for the purpose of getting money, of their entry into the house after ringing the bell with no response, of defendant's shooting the victim who

1. Nothing found in the vehicle was introduced in evidence. Following the hearing on the motion to suppress, the court granted suppression of a .22 caliber cartridge found under the floor mat as not having been described in the search warrant.

was surprised on the premises, of their hurried departure in the Volkswagen, and of the subsequent disposal of the weapon by throwing it in a bay. Detective Rafferty's affidavit stated that he had received information through a conversation with Caprisecca that (1) the described Volkswagen had been used during the commission of the identified April homicide and (2) that Caprisecca and defendant had committed the homicide, which information he characterized as reliable. In denying the request for suppression of defendant's vehicle which had been seized pursuant to the warrant, the Judge before whom the suppression hearing was held found that reasonable and sufficient cause for the warrant had been demonstrated to the issuing Judge.

In that conclusion we find no error, an ample showing of probable cause (the *sine qua non* for issuance of a search warrant) having been made in the two documents—and, in particular, in the sworn statement by the accomplice Caprisecca—on which the request for the warrant was predicated.

Defendant's insistence that the sufficiency of the documents submitted to the issuing Judge must be measured by the two-pronged test set out in *Aguilar v Texas* (378 US 108) is misplaced. The requirements of *Aguilar* must be met when a warrant is sought on the basis of an affidavit made by a law enforcement officer reciting information relayed to him by another person—often, as in *Aguilar*, an unidentified informant. In such a case, where the affidavit "'contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein'" (378 US, p 113), it must be shown both that the source from which the officer obtained his knowledge was reliable and that the information obtained from that source was itself entitled to be credited. Subsequent application of the *Aguilar* requirements, by both the Supreme Court of the United States and the courts of this State, have been in cases in which the material necessary to provide reasonable cause for the issuance of a warrant has been included in the affidavit of the officer applying for the warrant and has consisted of communications to the officer by a third person, unsupported by a sworn statement or affirmation

of such third person (e.g., *United States v Harris*, 403 US 573; *Spinelli v United States*, 393 US 410; *United States v Ventresca*, 380 US 102; *People v Wirchansky*, 41 NY2d 130; *People v Hanlon*, 36 NY2d 549). In such a context there is need for disclosure to the issuing Magistrate of sufficient factual data to enable him to determine whether he may properly rely on the hearsay source of the officer's information as well as whether he may credit the information itself.

The *Aguilar* standard is inapplicable, however, when there is presented to the issuing Magistrate a sworn statement of the factual information sufficient to establish probable cause for the warrant's issuance, made by one—like Caprisecca in this case—as to whom the data is first-hand information by reason of his personal observations and participation in the events described. In such an instance there is no lack of personal knowledge on the part of the affiant—the factor significant in the *Aguilar*-type cases; rather the Magistrate has before him "facts or circumstances presented to him under oath or affirmation" (*Nathanson v United States*, 290 US 41, 47). A sufficient predicate for a finding of probable cause has been tendered; if the Magistrate entertains doubt as to the veracity of the maker of the sworn statement he may require that the affiant appear before him for examination before determining whether to issue the warrant. In the present case the County Court Judge was justified in concluding on the basis of the documents laid before him, including in particular Caprisecca's detailed eyewitness narrative of the events surrounding the homicide, that there was reasonable cause for the seizure of defendant's automobile. We perceive no error of law in that result (cf. *People v Hicks*, 38 NY2d 90; see *People v Brown*, 40 NY2d 183).

[3] Defendant's attempt to impeach the affidavit of Detective Rafferty by reason of what he contends amount to admissions by that officer that he knowingly, falsely characterized the information received from Caprisecca as "reliable" when in fact he believed it to be untrue at least in part, and thereby to bring this case within the proposition announced in *Franks v Delaware* (438 US 154) is unavail-

ing. The cited case, holding that a defendant is not in every instance foreclosed from challenging the veracity of factual statements in an officer's affidavit submitted to procure a search warrant, declared that if the defendant establishes that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit and that such false statement is necessary to the finding of probable cause, the search warrant must be voided. In the present case the doubt expressed by Detective Rafferty with respect to Caprisecca's truthfulness had no relation to the abbreviated information obtained from the accomplice which was set out in the detective's affidavit and described by him as "reliable"; that doubt concerned only details contained in Caprisecca's oral conversation with the officers, none of which were included in either of the documents presented when the warrant was sought. Additionally, even if Rafferty's affidavit were to be disregarded in its entirety, the sworn statement of Caprisecca alone was sufficient to provide probable cause for the issuance of the warrant (cf. *People v Seidita*, 49 NY2d 755). The principle of the *Franks* case is inapplicable.

[4] Finally, there is no merit to defendant's argument that the rule that a defendant may not be convicted on the testimony of an accomplice unsupported by corroborative evidence (CPL 60.22) should be applied as well to the establishment of probable cause for the issuance of a search warrant. No authority is cited or has been found to support such a proposition, and nothing in principle recommends its adoption. The statute prescribing the rule is itself expressly applicable only to convictions. Moreover, the significant difference in kind between the determination of guilt beyond a reasonable doubt as the predicate for the imposition of criminal sanctions, on the one hand, and the demonstration of probable cause sufficient to satisfy the constitutional requirements for search and seizure as the warrant for police investigation, on the other, justifies a differentiation (*Brinegar v United States*, 338 US 160).

[1] Because of the error in the failure to suppress defendant's statements made to Detectives Rafferty and Donohue in the absence of counsel, the order of the Appellate Divi-

sion should be reversed, the judgment of conviction vacated, testimony as to such statements suppressed, and the case remitted for further proceedings on the indictment.

WACHTLER, J. (dissenting). A defendant who commits a crime while out on bail should not be immune from questioning by police with respect to his latest criminal acts. Such a rule would be a benefit to the repeat offender and an obstacle to law enforcement.

More specifically, the issue on this appeal is whether this court should extend the rule of *People v Rogers* (48 NY2d 167) to the facts of the present case. The majority holds that because the defendant had been represented by counsel on prior charges at the time of the interrogation the incriminating statements the defendant gave in the absence of counsel must be suppressed. The majority fails to accord significance to the fact that the police knew only that defendant had been previously arrested and did not know defendant had counsel on those earlier charges, or to the fact that defendant never indicated in any manner that he desired the aid of an attorney.

The defendant was convicted after a jury trial of felony murder in connection with a burglary in Deer Park, New York. Defendant, with an accomplice, entered the apartment of an acquaintance late at night apparently believing that no one was home. However, one of the occupants, the victim of the shooting, was alone at the time in a locked upstairs bedroom, unaware of the intruders. Upon discovering the locked door, defendant began to kick it open. When the victim appeared at the door the defendant drew his pistol and fired four to five shots, three of which struck the victim, inflicting the fatal wounds. Defendant and his companion immediately fled.

The defendant had parked his Volkswagen automobile, which was recognizable because of discolored paint and an inoperable left rear light, not far from the crime scene. When a canvass of the neighborhood disclosed that neighbors had seen the vehicle at or near the time of the crime, the police issued an alert which later resulted in a sighting of the vehicle near the defendant's apartment. The homicide detectives were notified.

While the investigation continued, defendant and the same accomplice were arrested in connection with another burglary, this one in connection with an arson. However, for reasons which do not appear in the record, defendant was released from custody on that charge. Thus, at the time defendant was brought into custody for questioning on the murder charge, it was known by the police that defendant had been arrested and released about nine days before. There is no indication in the record that the interrogating officers knew whether defendant had been arraigned on the other charges, but the findings of fact by the suppression court clearly note that none of the police officers involved in the interrogation knew whether or to what extent the defendant had been represented by counsel. Though defendant never mentioned it to the police, it appears that he did in fact have counsel on the prior charges.

Once in custody the defendant was given his *Miranda* warnings, which he stated he understood, and after which the defendant indicated he would speak to the officers without an attorney. He was then confronted with a statement which had been given by his accomplice, and this prompted the inculpatory admissions which the defendant later moved to suppress. Both the suppression court and the Appellate Division agreed that the motion should be denied. I would affirm.

In doing so I would not suggest that in situations where a defendant by a request for counsel expresses a personal inability to deal with the power of the State the right to that counsel can ever be disregarded (see *People v Marrero*, 51 NY2d 56; *People v Rogers*, 48 NY2d 167, *supra*; *People v Hobson*, 39 NY2d 479). Nor would I advocate a retrenchment from the principle that a defendant is entitled to counsel at all critical stages of a criminal prosecution (*People v Samuels*, 49 NY2d 218; *People v Settles*, 46 NY2d 154). What I do urge, however, is that neither of these principles requires the conclusion that a person who has once been arrested on a charge, however minor, upon which counsel has either entered the picture actually or constructively, must be insulated from uncounseled police interrogation (see *People v Kazmarick*, 52 NY2d 323). Such a conclusion, in addition to not being analytically required,

serves to extend prior cases beyond their intended scope, create injustice, and benefit those who are frequently arrested.

It has never been held, nor does basic fairness require, that all police interrogations will always, and in all circumstances, take place in the presence of counsel. Implicit in this is a recognition that a defendant in most instances is capable of deciding for his own reasons whether he is in need of or desires such assistance. Also implicit is that there is no need for the paternalistic view that the police should assure the assertion of a defendant's right to counsel, despite his own expressed wishes to the contrary.

To be sure, once asserted in a custodial setting the right to counsel would be of impaired value if it could be thereafter waived as a result of the often subtle persuasion against which the defendant originally sought protection (see *People v Cunningham*, 49 NY2d 203). For the same reason, the police will not be permitted to undo a request for counsel by shifting the focus of the interrogation to crimes unrelated to those on which the custody is based (see *People v Rogers*, 48 NY2d 167, *supra*). But a significantly different situation arises where the defendant has in no way, despite an expressed opportunity to do so, sought the advice of counsel in connection with a particular custodial event or on a particular charge (cf. *People v Skinner*, 52 NY2d 24). In that instance there is simply no indication of a defendant's inability to deal with the police, and if he chooses to do so there is no inherent evil in permitting the defendant to proceed in the absence of an attorney.

To be distinguished, of course, are those cases where despite a defendant's consent to an uncounseled interrogation, the right to an attorney nonetheless applies because the context has formally shifted from the investigatory to the critical accusatory state (see, e.g., *People v Settles*, 46 NY2d 154, *supra*). Because at that point a defendant is, as a matter of law, no longer capable of assessing without counsel the significance of his actions, any waiver of that right must be done in the presence of counsel or in open court. But logic does not support the assumption that because a defendant has a right to counsel in the critical

stages of one proceeding, an equally critical phase has been reached in all other unrelated investigations. For this reason, it is not material that the police in this case knew of a prior arrest of the defendant on which his right to counsel might have attached.

It also does not necessarily follow that the knowledge of the police of defendant's arrest is the equivalent of knowledge that he actually was represented by counsel. Beyond this, there certainly is no reason to assume on these facts that if there was counsel, that counsel would have become involved in a subsequent unrelated investigation, particularly in view of defendant's assertion that he wishes to proceed without the assistance of counsel (cf. *People v Arthur*, 22 NY2d 325).

Nevertheless, the majority contends that the police were bound to make affirmative inquiries into the possibility that defendant might in some manner have been represented by counsel. However, neither the Federal courts, nor this court on any previous occasion has ever suggested the constitutional necessity for what must be recognized as a new addition to the litany of *Miranda* warnings. It is already the law that a suspect must be clearly told that he may refuse to say anything in the absence of his attorney. To say that the police must do more than this carries the right to counsel to unheard of extremes.

It is the common criminal, not the one-time offender, who nearly always will manage to have at least one serious charge pending, so that the attorney in the picture can provide him with virtual immunity from questioning in subsequent investigations. I had thought it clear that although our courts are sometimes required to let the guilty go free, this is not because the Constitution serves only the miscreant, but rather because our constitutional protections must apply evenly to us all. By its analysis I believe the majority has turned this basic principle completely around by providing what is in effect a dispensation for the persistent offender.

Accordingly, for the reasons stated above, I dissent and vote to affirm the judgment of conviction.

Chief Judge COOKE and Judges FUCHSBERG and MEYER concur with Judge JONES; Judge WACHTLER dissents and votes to affirm in a separate opinion in which Judges JASEN and GABRIELLI concur.

Order reversed, judgment of conviction vacated, statements made to Detectives Rafferty and Donohue suppressed and case remitted to Supreme Court, Suffolk County, for further proceedings on the indictment.